Exhibit 23

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-99000-cgm

- x

In the Matter of:

BERNARD L. MADOFF,

Debtor.

- x

Adv. Case No. 10-03635-cgm

- x

Fairfield Sentry Limited (In Liquidation) et al,

Plaintiff,

v.

Union Bancaire Privee, UBP SA et al,

Defendants.

- x

Adv. Case No. 10-03636-cgm

- x

Fairfield Sentry Limited (In Liquidation) et al,

Plaintiff,

v.

Union Bancaire Privee, UBP SA et al,

Defendants.

- x

Adv. Case No. 10-04285-cgm

- x

IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff,

Plaintiff,

v.

UBS AG, UBS (Luxembourg) SA et al,

Defendants.

- x

Adv. Case No. 10-05345-cgm

- x

IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff,

Plaintiff,

v.

Citibank, N.A. et al,

Defendants.

- x

Adv. Case No. 11-02572-cgm

- x

IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff,

Plaintiff,

v.

Korea Exchange Bank, Individually And As Trustee,

Defendants.

- x

Adv. Case No. 11-02573-cgm

- x

IRVING H. PICARD, Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff,

Plaintiff,

v.

The Sumitomo Trust and Banking Co., Ltd.,

Defendants.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

September 14, 2022

10:02 AM

B E F O R E :

HON CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

Adversary proceeding: 10-03635-cgm Fairfield Sentry Limited (In Liquidation) et al v. Union Bancaire Privee, UBP SA et al

Doc# 939 Notice of Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof (related document(s)938) filed by Clerk of Court, United States Bankruptcy Court, SDNY. with hearing to be held on 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)

Doc. #938 Letter Requesting a Pre-Motion Discovery Conference Filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof. (Attachments: # 1 Exhibit A - Email Correspondence (2022.05.06 2022.07.14) # 2 Exhibit B - Plaintiffs' First Request for Production Of Documents to Dexia BIL # 3 Exhibit C - Plaintiffs' Rule 30(b)(6) Notice to Dexia BIL (2022.07.21) # 4 Exhibit D - Email

Correspondence (2022.07.21 2022.08.05) # 5 Exhibit E - Plaintiffs' Amended Rule 30(b)(6) Notice to Dexia BIL (2022.07.28))(Elsberg, David)

Doc# 941 Notice of Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg (related document(s)940) filed by Clerk of Court, United States Bankruptcy Court, SDNY. with hearing to be held on 9/14/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)

Doc. #940 Letter Requesting a Pre-Motion Discovery Conference Filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg. (Attachments: # 1 Exhibit 1, Email from Nemetz # 2 Exhibit 2, Email from Butler # 3 Exhibit 3, Email from Nemetz # 4 Exhibit 4, Amended Deposition Notice)(Butler, Jeff)

Adversary proceeding: 10-03636-cgm Fairfield Sentry Limited (In Liquidation) et al v. Union Bancaire Privee, UBP SA et al Doc# 1005 Notice of Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by David Elsberg on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell,

solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof. (related document(s)1004) filed by Clerk of Court, United States Bankruptcy Court, SDNY. with hearing to be held on 10/19/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)

Doc. #1004 Letter Requesting a Pre-Motion Discovery Conference Filed by David Elsberg on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof. (Attachments: # 1 Exhibit A - Email Correspondence (2022.05.06 2022.07.14) # 2 Exhibit B - Plaintiffs' First Request For Production Of Documents to Dexia BIL # 3 Exhibit C - Plaintiffs' Rule 30(b)(6) Notice to Dexia BIL (2022.07.21) # 4 Exhibit D - Email Correspondence (2022.07.21 2022.08.05) # 5 Exhibit E - Plaintiffs' Amended Rule 30(b)(6) Notice to Dexia BIL (2022.07.28))(Elsberg, David)

Doc# 1007 Notice of Hearing to consider the Letter Requesting a Pre-Motion Discovery Conference Filed by Jeff

E. Butler on behalf of Dexia Banque International a Luxembourg. (related document(s)1006) filed by Clerk of Court, United States Bankruptcy Court, SDNY. with hearing to be held on 9/14/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)

Doc. #1006 Letter Requesting a Pre-Motion Discovery Conference Filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg. (Attachments: # 1 Exhibit 1, Email from Nemetz # 2 Exhibit 2, Email from Butler # 3 Exhibit 3, Email from Nemetz # 4 Exhibit 4, Amended Deposition Notice)(Butler, Jeff)

Adversary proceeding: 10-04285-cgm Irving H. Picard, Trustee for the Liquidation of B v. UBS AG, UBS (Luxembourg) SA et al
Doc# 290 Motion to Dismiss Adversary Proceeding (Dismiss Second Amended Complaint), filed by Anthony L. Paccione on behalf of Access International Advisors LLC, Access International Advisors Ltd., Access Management Luxembourg SA (f/k/a Access International Advisors Luxembourg) SA) as represented by its Liquidator Maitre Ferdinand Entringer, Access Partners SA as represented by its Liquidator Maitre Ferdinand Entringer, Claudine Magon de la Villehuchet (a/k/a Claudine de la Villehuchet) in her capacity as Executrix

under the Will of Thierry Magon de la Villehuchet (a/k/a Rene Thierry de la Villehuchet), Claudine Magon de la Villehuchet (a/k/a Claudine de la Villehuchet) individually as the sole beneficiary under the Will of Thierry Magon de la Villehuchet (a/k/a Rene Thierry de la Villehuchet), Groupement Financier Ltd., Patrick Littaye.

Doc# 295 Motion to Dismiss Case filed by Cathy M. Liu on behalf of Theodore Dumbauld.

Doc# 302 Motion to Dismiss Adversary Proceeding / Notice of UBS Defendants Motion to Dismiss Second Amended Complaint (related document(s)274) filed by Marshall R. King on behalf of UBS AG, UBS EUROPE SE (f/k/a UBS (LUXEMBOURG) SA, UBS Fund Services (Luxembourg) SA, UBS Third Party Management Company SA. with hearing to be held on 9/14/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) Responses due by 6/17/2022

Doc# 271 Notice of Adjournment of Hearing RE: Hearing to consider the Letter to Chambers Requesting Addition of Adversary Proceeding to Omnibus Hearing on January 19, 2022 Filed by Brett S. Moore on behalf of Luxalpha SICAV as represented by its Liquidators Maitre Alain Rukavina and Paul LaPlume (related document(s)269) filed by Clerk of

Court, United States Bankruptcy Court, SDNY; hearing held and adjourned to 6/15/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

Doc# 307 Opposition /Trustee's Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Second Amended Complaint (related document(s)295, 296, 283, 290, 281) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

Adversary proceeding: 10-05345-cgm Irving H. Picard, Esq., Trustee for the Substantive v. Citibank, N.A. et al Doc# 222 Motion to Dismiss Adversary Proceeding filed by Carmine Boccuzzi on behalf of Citibank, N.A., Citicorp North America, Inc., Citigroup Global Markets Limited. with hearing to be held on 9/7/2022 (check with court for location) Responses due by 7/1/2022,

Doc# 231 Opposition /Trustee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (related document(s)222) filed by David J. Sheehan on behalf of Irving H. Picard, Esq., Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC, and the Estate of Bernard L.

Madoff.

Doc# 234 Reply Memorandum of Law in Support of Citi Defendants' Motion to Dismiss (related document(s)222) filed by Carmine Boccuzzi on behalf of Citibank, N.A., Citicorp North America, Inc., Citigroup Global Markets Limited.

Adversary proceeding: 11-02572-cgm Irving H. Picard, Trustee for the Liquidation of B v. Korea Exchange Bank, Individually And As Trustee F
Doc# 140 Opposition /Trustee's Memorandum of Law in Opposition to Defendant Korea Exchange Bank's Motion to Dismiss the Complaint (related document(s)135) filed by Eric R Fish on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

Doc# 145 Reply to Motion filed by Richard A. Cirillo on behalf of Korea Exchange Bank, Individually and As Trustee For Korea Global All Asset Trust I-1, And For Tams Rainbow Trust III.

Doc# 144 Amended Motion to Dismiss Adversary Proceeding filed by Richard A. Cirillo on behalf of Korea Exchange Bank, Individually and As Trustee For Korea Global All Asset

Trust I-1, And For Tams Rainbow Trust III. with hearing to be held on 9/7/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM) (Cirillo, Richard)

Adversary proceeding: 11-02573-cgm Irving H. Picard, Trustee for the Liquidation of B v. The Sumitomo Trust and Banking Co., Ltd.

Doc# 119 Stipulation and Order Signed on 5/5/2022 To Amend Briefing Schedule And Adjourn Argument Date to 9/14/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Good morning, everyone. I have a letter requesting a discovery conference and this is in Adversary Proceeding 10-03635 and 10-03636. This is Fairfield Sentry v. Union Bancaire Privee and Fairfield Sentry v. Adler and Company Private Bank AG. State your name and affiliation.

MR. BUTLER: Good morning, Your Honor. It's Jeff Butler from Clifford Chance, representing the Defendant -- one of the Defendants in this case, Bank International a Luxembourg or BIL.

THE COURT: Okay, hold on for me a minute. Okay. So, that's the union bank, is that what it is?

MR. BUTLER: No, Your Honor. There are dozens of defendants in these two cases. We're just one of the many.

THE COURT: Okay.

MR. BUTLER: And it's called in the caption Dexia Banque International a Luxembourg, but the name was changed many years ago to BIL.

THE COURT: Hold on just a second. Our recording has not picked up, so you may have to repeat some information.

MR. BUTLER: Sure.

THE COURT: But while they're doing that, tell me which case number you're on. 03635?

MR. BUTLER: 3635 and 3636, Your Honor.

THE COURT: Oh, so you're on both?

MR. BUTLER: We are Defendants in both of the cases, correct.

THE COURT: Okay. Hold on just a second until we find out about the sound. We do have backup sound, so it's not -- backup recordings, just so you know. Hold on, let me turn a light out. Just a second. Who would've thought two years ago we'd be light and sound people? Good grief. Okay, we'll just keep going with what we've got because we do have backup.

So, this is -- and who for Fairfield?

MR. ELSBERG: Your Honor, this is David Elsberg for the liquidators. And Id' like to ask my associate, Amy Nemetz, to introduce herself. Because with your permission, my associate Ms. Nemetz will be addressing the Court today.

THE COURT: I am delighted to have always young associates, so welcome. State your name for the record, please.

MS. NEMETZ: Amy Nemetz for the liquidators, Your Honor.

THE COURT: Very good. Now, I have some questions, but let's go with what you all have to say to me first.

MS. NEMETZ: Certainly, Your Honor.

MR. BUTLER: Sure, Your Honor.

MS. NEMETZ: Oh. Which letters would you like the parties to address first? Because there are two.

THE COURT: Okay. All right. You tell me.

MS. NEMETZ: Jeff, would you mind if I go first?

MR. BUTLER: Of course. Please.

MS. NEMETZ: Thank you.

THE COURT: His name is Mr. Butler on the record.

MS. NEMETZ: Yes, Your Honor.

THE COURT: Okay.

MS. NEMETZ: Your Honor, the liquidators respectfully request that you compel counsel for Defendant BIL, which is Banque International a Luxembourg, to explain why relevant email communications were lost. We only recently learned that BIL has no electronically stored communications. The liquidators' document requests, which were served in September 2021, explicitly asked for these communications and we had two Rule 26(f) conferences with BIL's counsel, on October 1st and October 14, 2021. At no point did BIL's counsel tell us that it did not have custodial emails.

This spring, BIL said that it had substantially completed its production of documents for jurisdictional discovery. That production was 74 pages of scanned hardcopy files. We asked, what about email discovery?

After following up on our proposed email search a number of times, after six weeks, BIL's counsel on the deadline for substantially completing jurisdictional discovery told us for the first time that BIL does not have access to emails. We were surprised, Your Honor. Dozens of other defendants in these actions, including Luxembourg entities like BIL, managed to preserve, search for and product many electronically stored communications.

We asked BIL's counsel that same day, June 30th, what happened to the emails and why weren't they preserved? BIL's counsel did not respond to us. As you can see in Exhibits A and D to the liquidators' office 11th letter, we asked BIL's counsel five separate times in writing on June 30th, July 12th, July 14th, July 28th and August 5th to just tell us what happened to the emails. Your Honor can also see from those email chains that BIL's counsel either ignored or sidestepped our requests. They're simply refusing to tell us the facts.

We also served a Rule 30(b)(6) notice so that we could ask a BIL witness the same questions about document preservation that BIL's counsel was refusing to answer. BIL's counsel didn't serve written objections or responses to the proposed deposition topics or meet and confer with us about scheduling or logistics. Instead, BIL is here today seeking a protective order that would excuse it from having

to disclose anything about document preservation.

Even after the Court set this hearing, we tried to communicate with BIL's counsel and resolve this email issue. On August 24th, we asked BIL's counsel if he had been in touch with relevant custodians or anyone else at BIL who might know of any other place where relevant email communications were saved. He said he didn't know. He promised he would get back to us a week later. But as of two weeks after our discussion on September 6th, he said he still didn't know.

Perhaps BIL's counsel is willing and able to provide this information today but until that happens, the liquidators are stuck. BIL's repeated stonewalling and refusal to engage with us on these issues is, in our view, inconsistent with its obligations under the federal rules of civil procedure and with the standards of conduct that Your Honor has explained are expected by parties appearing before this Court, and the treatment that we are getting is causing serious prejudice to the liquidators.

BIL's failure to preserve electronic communications in the first place prejudices our ability to respond to its motion to dismiss. BIL has argued in that motion that the liquidators failed to allege specific contacts between it and the United States, but evidence of those contacts is precisely what we are after. The day-to-

day emails, chats, meeting invitations, the paper trail that should have been left behind showing that BIL directed its activities to the United States.

In the Picard litigation, Your Honor recently held that alleged email communications between a foreign Sitco customer Defendant, on the one hand, and BLMIS and FGG and the United States on the other was a relevant jurisdictional contact. That decision can be found at Adversary Proceeding Number 12-1693 Docket 21830 at Page 7.

BIL's document production to date, however, includes zero communications or diary entries of this type, which the Court has held constitutes critical jurisdictional evidence. And that is despite the fact, in our view, that Your Honor has repeated ordered that the liquidators need discovery on these issues, an order which Judge Preska recently affirmed in full.

Separately, BIL's refusal to disclose the circumstances under which it lost these emails prejudices the liquidators' ability to seek relief under Federal Rule of Civil Procedure 37, which addresses potential spoliation. Rule 37 is highly fact-specific. It asks whether the failure to preserve occurred when litigation was reasonably foreseeable and whether the party took reasonable step under the circumstances. The relief is also highly fact-specific. If evidence was destroyed intentionally, then the

liquidators might be entitled to an adverse inference. But even if the evidence was destroyed accidentally, the liquidators would be entitled to different curative relief such as, for example, striking certain arguments from BIL's motion to dismiss.

Under similar circumstances, other courts have ordered disclosure of these facts. A 2016 District of Connection decision called Bagley v. Yale University at 318 F.R.D. 234 is very instructive. There the court identified specific factual questions related to litigation holds and document retention policies, and then compelled the defendant to provide information about its document preservation efforts to the plaintiff so that the plaintiff could evaluate its position and whether relief was necessary under Rule 37.

That is precisely what the liquidators are seeking Your Honor's assistance with today. The point is we need the facts about BIL's preservation efforts in order to navigate this issue. Only BIL has those facts, and BIL is refusing to disclose that information to us and ultimately to this Court.

Moving on to BIL's responses to our positions, BIL has raised three main points, and I'll address each one in turn. First, BIL says that our spoliation concerns are hypothetical. They are not hypothetical, Your Honor. BIL's

employees engaged in email communications during the relevant timeframe, and BIL's August 12th letter to this Court says, "It does not have" those emails. That is the definition of potential spoliation.

Moreover, the limited facts that BIL has offered about its document preservation efforts strongly suggests that it did not act reasonably under the circumstances. For example, if you turn to Page 2 of Exhibit A that was submitted with the liquidators' letter, Mr. Butler's July 12th email says that BIL started preserving evidence in late 2010. Late 2010 was almost two years after the whole world learned that BLMIS was fraud. There is case law for the proposition that revelation of a major fraud usually triggers litigation and puts everyone potentially involved on notice that they have to preserve relevant evidence, and some of those cases are cited in Footnote 2 of our August 11th letter.

In our view, Your Honor, disclosure of the largest Ponzi scheme in history, which included Fairfield Sentry as a feeder fund, and we know that BIL redeemed over $50 million from Sentry alone, should have raised a very big flag to BIL to keep everything related to BLMIS, including emails.

Second, BIL argues that it has already produced all of the relevant emails that existed by giving us its

hardcopy transaction file. The 74 pages in that transaction file contain 25 emails. They appear to be incomplete, missing pages and attachments, and for obvious reasons, they don't have metadata associated with them the way that electronic discovery would. So, we can't see, for example, whether anyone was blind-copied on the communications.

More broadly, BIL cannot back up its assumption that its employees printed every email that we've asked for in discovery. BIL's production doesn't have communications with BLMIS, which the liquidators sought in Request Number 14, or communications about marketing and investment in the funds, which the liquidators sought in Request Number 6. BIL's counsel has given us no reason to believe that these 25 printed emails were the only communications ever exchanged that could be relevant to personal jurisdiction issues.

Third, BIL argues that the information we're seeking about the preservation of evidence relevant to personal jurisdiction is somehow outside the scope of jurisdictional discovery. Taken literally, BIL's argument means that it could destroy all evidence of contacts with the United States, file a motion to dismiss for lack of personal jurisdiction and never have to disclose what happened to that evidence until the case somehow reaches the merits. More simply, BIL is just wrong. In our view, Your

Honor has been very clear that the liquidators are entitled to all discovery permissible under the Federal Rules of Civil Procedure. Rule 37 clearly encompasses the information that we are asking for about document preservation efforts. If BIL requires yet another order authorizing this discovery, however, we see no reason that the Court cannot enter that today.

My final point, Your Honor, is to respond to BIL's letter seeking a protective order. Today, the liquidators are not asking this Court to compel a Rule 30(b)(6) deposition. In our view, if Your Honor orders BIL's counsel to answer our questions about document preservation, and if he does so completely, both sides can possibly avoid taking a 30(b)(6) deposition at all and everyone can avoid litigating whether or not a protective order should be in place.

For the record, the liquidators don't believe BIL's request for a protective order has any merit. First, BIL failed to meet and confer with us about the scope of the deposition we requested. That violates the face of Rule 26(c) under which it is seeking a protective order, as well as Local Rule 7007-1 and Your Honor's individual practices. Second, BIL has made no attempt to show good cause in the form of undue burden or expense from preparing a single witness to testify on a limited number of topics. Finally,

the sole basis on which BIL seeks this protective order, its scope argument, is nonsensical for the reasons I've already explained.

In sum, the liquidators are seeking the Court's intervention so that we all can determine what happened to BIL's emails and resolve the resulting prejudice to the liquidators. We just want the facts, Your Honor. We want the facts about BIL's contacts with the United States so that we can address personal jurisdiction, and we want the facts about BIL's failure to preserve emails so that we can address any potential spoliation issues and, if necessary, seek additional relief from the Court. At this point, I would be happy to answer any questions that the Court has.

THE COURT: I think you answered my questions without my asking. Mr. Butler?

MR. BUTLER: Good morning, Your Honor. First, a little bit of background. In this case there's only one redemption that's at issue with respect to my client. It's a $3.9 million redemption that occurred in August of 2007. It's not $50 million that's at issue in this case for my client.

THE COURT: I think she said 15, didn't she?

MS. NEMETZ: I said 50, Your Honor.

THE COURT: Oh, I'm sorry. I apologize. Okay.

MR. BUTLER: The practice at my client, which is a

bank in Luxembourg, was to keep all documents including email and correspondence in transaction-specific files and those files were clearly preserved for this redemption because we've produced those files as well as the transaction files for the preceding subscription, which was $3.3 million. And as Ms. Nemetz pointed out, there are about 25 emails in those files, which is about, Your Honor, what one would expect because this was an execution-only transaction for BIL. They were merely getting instructions from a client and executing those instructions. There was not -- there's no reason to believe there would be a lot of discussion about that, there's no reason to believe there would be a lot of email traffic concerning that kind of transaction.

So, as I said, we've produced the transaction files, we've actually produced a total of about 500 pages of documents for jurisdictional discovery. In this motion -- and I thought this was the focus on this motion -- the liquidators are seeking a broad Rule 30(b)(6) deposition into document preservation efforts back at the time this case was originally filed in late 2010. Now, that kind of deposition is relatively normal in merits discovery. And if this were merits discovery, I wouldn't be here before Your Honor. But this is jurisdictional discovery that is really supposed to be focused on contacts between my client and the

United States as they relate to the specific subject matter at issue in this case, which is only one redemption in August of 2007.

So, our position is that, number one, this type of deposition is just not appropriate for jurisdictional discovery because it's broadly inquiring into events that occurred either in 2008, a year after the redemption, or in 2010 when this action --

THE COURT: Mr. Butler, she -- I think Ms. Nemetz was very clear. Right now, she's not asking for that. She's asking for the email trail in order to be able to, if necessarily, have that deposition. Am I correct, Ms. Nemetz, or did I hear that wrong too?

MS. NEMETZ: That's partially correct, Your Honor. We either need the email trail or, if the email trail was not preserved, we need to understand the circumstances that led to that.

THE COURT: Well, that's -- that might be for another day.

MS. NEMETZ: Yeah.

THE COURT: Mr. Butler, go ahead.

MR. BUTLER: Well, my response to your question, Your Honor, would be that we believe we have produced the email trail that exists. We're not aware of a -- you know --

THE COURT: Well, you produced hardcopy. Where's the -- where's the data on those emails? You don't get it -- you don't get it in hardcopy, Mr. Butler.

MR. BUTLER: Electronic -- we don't have --

THE COURT: And I know that.

MR. BUTLER: Yeah. I'm sorry, Your Honor, I didn't --

THE COURT: Well, then if you don't have it, then you do need a 30(b)(6). You do need somebody testifying to where it is and what's going on. If you can't produce it, then you need somebody testifying to it. You need a deposition on it.

MR. BUTLER: Your Honor, we -- it is definitely true that we don't have electronic copies of all the emails. They were only stored in the equivalent of hardcopy form. I mean, I think I disclosed that information to the liquidator. They're aware of it. The -- and so, I mean, we can't produce what we don't have, is my point.

THE COURT: Well, you say you can't produce what you don't have. Then you have to have someone testify to that, and the lawyer can't do that, is what you're also saying.

MR. BUTLER: I fully agree that the lawyer can't do that, and I appreciate that comment, Your Honor. I just -- I don't think that it's appropriate in jurisdictional

discovery, which is supposed to be narrow, to go off on a frolic and detour about a possible spoliation argument when there's not even a reason to believe that any significant document is missing because of the nature of this case and the nature of the transaction at issue. It's a very simple transaction, Your Honor. You wouldn't expect there to be a lot of email.

THE COURT: Okay, but wait, Mr. Butler. But, Ms. Nemetz, you said that the emails were not complete. Can you give us an example?

MS. NEMETZ: Yes, Your Honor. There are emails that BIL has produced in hardcopy where --

THE COURT: Well, give us -- give us one example so we can all understand what you're talking about.

MS. NEMETZ: Yes. Let me just bull up the Bates Number so that I can be as specific as possible.

THE COURT: Okay.

MS. NEMETZ: So, one example is the document produced at BIL005 through 007. That's a printed email chain that shows on its face that it attached scanned hardcopy files to it. It's not clear from the production whether those attachments were also produced.

THE COURT: Okay. All right, Mr. Butler, that's -- I -- where are those attachments to those emails?

MR. BUTLER: That's an answer I don't have, Your

Honor, and I don't think anyone -- that my client has an answer to that. We're talking about emails that were sent -

THE COURT: You're talking to someone -- you're talking to someone that's totally familiar with electronic data. So --

MR. BUTLER: I understand, Your Honor.

THE COURT: So, let's be clear about that. I'm sort of in a rock and a hard place, because when I listened to Ms. Nemetz it was like, make sure that you have that information too. And then you're saying that information doesn't exist. So, then that does instantly equal having a Rule 30(b)(6) deposition. So --

MR. BUTLER: Your Honor, respectfully, I don't think there's any reason to believe that the kind of broad email record that Ms. Nemetz is speculating about -- there's no reason to believe it ever existed.

THE COURT: If you've got an attachment to an email, and that attachment has not been produced, and you've produced the email without the attachment -- no, that's not right.

MR. BUTLER: Your Honor, that -- it was produced in that form because that's how it was maintained in the ordinary course in the files of my client. Now, this specific email, Your Honor, was not raised with me -- has

not been raised with me before as a focus of the liquidators' concern. I would be happy to go back to my client and see if there are additional searches that could be performed to locate those specific attachments.

THE COURT: Why didn't you do that before? Why are we -- when you -- when you had the Rule 26 obligation to have done that before?

MR. BUTLER: Your Honor, in the meet and confer process where we were discussing the scope of documents that we would produce, we were I think very clear about the scope that we were willing to produce. I never had a response from Ms. Nemetz or anyone on the liquidators side saying, we really think we need these particular attachments. I don't even know the content of that email that Ms. Nemetz just cited to you --

THE COURT: Of course you didn't, unless you had it to begin with. Okay, like I say, I'm sort of in a rock and a hard place. We have incomplete emails. Ms. Nemetz, Mr. Butler, meet in person.

MR. BUTLER: Oh, happy to do that, Your Honor.

MS. NEMETZ: Certainly, Your Honor.

THE COURT: Meet in person, have your documents there. And I'm going to just kick the can down the road because right now, what I'm going to demand is you meet the requirements under Rule 26. And that means you get

metadata. And I know they've got it. You can't tell me a bank doesn't have it.

That being said, I'll talk about the 36 -- the 30(b)(6) possibility on October 19th. So, you all have got time to get -- take a look at everything, go over line by line whatever needs to be done, and then -- that's quick. So, I'll need to know exactly what I'm ruling on at that time but it will be the possibility of having the 30(b)(6).

Now, Ms. Nemetz, we're talking about jurisdiction here and Mr. Butler's correct. This is narrow.

MS. NEMETZ: Yes, Your Honor.

THE COURT: So -- and I'll tell you what I'm looking for, Mr. Butler, is -- just as she said, those BCCs. Who did those blind copies go to? Are there any? Are you dealing with the United States on those blind copies? They need to really look at their material instead of just simply saying, we don't have it. That's insufficient for me at this stage.

MS. NEMETZ: Yes, Your Honor. I appreciate your guidance so far. I just want to say that I'm happy to meet and confer with Mr. Butler in person as many times as is necessary to sort this out. But so far, whenever we've asked these questions -- for example, we asked him several weeks ago whether he'd spoken to any of the relevant custodians who sent these emails, and he said no. And we

still don't --

THE COURT: Mr. Butler, I want the names of people you spoke to at the bank. I want the names of the people that you're dealing with to make sure this is done.

For instance, if you called me and said, I need something from the Court, I am going to have to call my IT specialist. And I'm going to tell you, Mr. Butler, as my lawyer, that I have to talk to that IT specialist to know about it.

MR. BUTLER: Mm hmm.

THE COURT: I want you to have that chain in your head when you do it.

MR. BUTLER: Certainly, Your Honor. I've already discussed it --

THE COURT: I want a chain of custody from this and I don't -- okay, you talked to the CEO. No, the CEO doesn't have it. I know the CEO doesn't have it. Who is in charge of IT? Who is the head of IT? Who is the one responsible for retaining the documents? You get me a chain of custody because you yourself cannot testify to that information. And you know it and I know it.

MR. BUTLER: Agreed, Your Honor. And I will say I haven't chased all that information down to date, although I had many conversations with my client on this subject -- but we can do more to get what you're requesting.

THE COURT: Your client. Which client? Which client? Did you talk to the IT guy? Did you talk to --

MR. BUTLER: Your Honor, I've spoken primarily to the Legal Department of BIL.

THE COURT: Well, the Legal Department can't testify to it either, and you know that and I know that. Who's -- who's responsible for the chain of custody for the information in that bank?

MR. BUTLER: I understand, Your Honor.

THE COURT: Come back and see me on October 19th. You two talk, but you two talk in person. Where are you all?

MR. BUTLER: I believe we're both in New York, Your Honor.

THE COURT: Perfect.

MS. NEMETZ: I believe our offices are across the street from each other, Your Honor.

THE COURT: That's even better. Yeah. But have your list and remember we're concentrating on jurisdiction. But, Mr. Butler, it's not the legal staff. That legal staff better be talking to who's in charge of the documents and telling you so.

MR. BUTLER: Yes, Your Honor, I understand, I understand.

THE COURT: Excellent. I'm going to take a quick

break. It'll only be about three minutes -- to turn the air conditioning down.

MR. BUTLER: Thank you, Your Honor.

MS. NEMETZ: Thank you, Your Honor.

THE COURT: Thank you. Okay, we are now into the contested matter. Let me get this one off my plate. Very good. I believe the next one we have on the agenda is basically 10-04285, Trustee for the BLMIS v. UBS AG, UBS Luxembourg. Who else do we have on this one? Let me find out. It's all the UBS entities, correct? State your name and affiliation and make sure I'm correct.

MR. KING: Good morning, Your Honor. It's Marshall King from Gibson Dunn & Crutcher on behalf of the four UBS Defendants. And I can give you those names if you'd like them.

THE COURT: Just put it on the record, please.

MR. KING: Sure. Sure. That's UBS AG, UBS EUROPE SE, UBS Fund Services (Luxembourg) SA and UBS Third Party Management Company SA.

THE COURT: Excellent, thank you.

MR. KING: And there are other Defendants as well, as Your Honor noted, and I'm sure counsel will put their appearance on as well.

THE COURT: Excellent.

MS. USITALO: Good morning, Your Honor. This is

Michelle Usitalo of Baker Hostetler for the Trustee, Irving Picard. I'm also here this morning with my colleagues, Mr. Warshavsky, as well as Ms. Fernandez and Ms. Stork.

MR. PACCIONE: Your Honor, Anthony Paccione from Katten Muchin Rosenamn, on behalf of the Access Defendants, who I could read their names into the record if you'd like.

THE COURT: Let's do. Let's just make the record clear.

MR. PACCIONE: Sure. So, the Access Defendants that I'm referring to include Access International Advisory LLC, Access International Advisors LTD, Access Management Luxembourg SA, formerly known as Access International Advisors (Luxembourg) SA, Access Partners SA, Patrick Littaye, Claudine Magnon de la Villehuchet, whose name is in the caption and I'm happy to spell it, if necessary.

THE COURT: No, I have it down. Thank you.

MR. PACCIONE: And Groupement Financier Ltd.

MR. KNUTS: Good morning, Your Honor. It's Robert Knuts for Defendant Theodore Dumbauld.

THE COURT: And Mr. (indiscernible) has been adjourned, correct?

MR. KING: That's correct, Your Honor.

THE COURT: And then we have Defendants in their capacity as liquidators. Are they on the record today?

MR. KING: I don't believe they've moved to

dismiss, Your Honor.

THE COURT: I don't believe they have either. Exactly. I was just making sure. Thank you. Very good. It is your (indiscernible) business.

MR. KING: Thank you, Your Honor. Again, it's Marshall King from Gibson Dunn on behalf of the UBS Defendants. This is a case in which the Trustee is seeking to recover subsequent transfers that were made initially through two foreign feeder funds. One called Luxalpha and one called Groupement Financier.

I think as we discuss the issues of jurisdiction this morning, I think it's important to clarify that the UBS Defendants who are moving for dismissal on that basis are not investors in BLMIS and they are not investors in those foreign feeder funds. They are not alleged to have invested any of their own money with Madoff, whether directly or indirectly. Instead, we're talking about service providers to foreign funds. Those foreign funds contracted with the service providers under foreign law, under contracts governed by foreign law, to provide services to those funds in the foreign countries.

The Trustee claims there's jurisdiction here on the theory that these service providers were providing the scaffolding for investment activities by others -- by the funds, not by the Defendants themselves. In essence, the

Defendants, who are moving for personal jurisdiction dismissal, were doing business with entities, that is, the funds, that were transacting business in the United States but they were not themselves transacting business in the United States.

There are four UBS Defendants. Our motion for personal jurisdiction -- for lack of personal jurisdiction is on behalf of just three of those entities. The one we have not moved on, I think it's important to just clarify, is UBS Europe SE. It was formerly known as UBS Luxembourg SA, and it's frequently referred to in the second amended complaint here as UBS SA. That entity is alleged to have acted as the custodian for Luxalpha and to have communicated regularly with the Madoff entity, with BLMIS, by mail, by fax, by telephone. It's alleged to have signed contract with BLMIS on behalf of Luxalpha, to have opened an account with BLMIS. It effectuated the subscriptions and received redemptions on behalf of Luxalpha from Madoff.

As to the other three UBS Defendants, the ones who we are moving on behalf of, there are no such allegations about contacts with the United States. To the contrary, again, they are foreign entities which performed services abroad under contracts governed by foreign law and which received payment for their services abroad. It's important, I think, and the law requires that we focus on each of the

Defendants individually to assess whether they have purposely availed themselves of the privilege of doing business in the United States and whether the claims in this case arise out of or relate to those contacts.

If Your Honor would permit me, I have a series of demonstratives that I hope will be helpful to Your Honor in sorting through a whole list of acronyms and other names here. And if I could share my screen, I'd appreciate sharing some demonstratives this morning.

THE COURT: I think the host has to give you that power, and I'm not the host.

MR. KING: Okay.

THE COURT: Earlier -- earlier I said, you know, you'd have to talk to the IT staff.

MR. KING: Sure.

THE COURT: Well, you've got to talk to the IT staff. I believe it can be done.

MR. KING: Okay. I did share a set of these with counsel for the Trustee shortly before this morning's hearing began, Your Honor.

THE COURT: Let's -- let me get permission. I have to get permission to let you take the screen. So, give us two seconds.

MS. USITALO: Your Honor?

THE COURT: Yes?

MS. USITALO: This is Michelle Usitalo of Baker Hostetler for the Trustee. I just wanted to emphasize the shortly before the Trustee -- the shortly before the hearing part of Mr. King's statement, and just note that the Trustee had not yet had the opportunity to review any of these demonstratives.

THE COURT: Okay, we'll go -- he's now shared. It may be called kicking the can down the road again, but we'll see. Okay, you are now the cohost.

MR. KING: Thank you, Your Honor. Let me see if I can make this work. I know all the associates on my side are panicked that I'm trying to do this myself.

THE COURT: I will tell you that would be exactly what would happen here. The fact that they even let me punch a button is called panic.

MR. KING: Okay, I think I have done it. Is Your Honor seeing --

THE COURT: Perfectly. I see it.

MR. KING: Excellent.

THE COURT: Okay, you've got everybody here. USBAG et al., okay.

MR. KING: Great. So, first, I wanted to speak about Defendant UBS AG. UBS AG is a Swiss company headquartered in Switzerland. It's alleged in the complaint to have offices and activities in the United States but it's

not alleged, nor could it be, to be subject to general jurisdiction in the United States under the Daimler decision, and there's no allegation that any of the United States offices played any role in any way related to Luxalpha or Groupement Financier.

It's alleged to have been a cosponsor and co-promoter of Luxalpha but the complaint doesn't really explain what those roles are, and it doesn't allege any activity -- certainly not any U.S.-directed activity or conduct by UBS AG. And, in fact, what the complaint alleges -- and this is in Paragraph 162 -- is that the purpose of having UBS AG as the cosponsor and co-promoter was to satisfy certain Luxembourg and European regulatory requirements. It had nothing to do with anything with the United States.

The only conduct by UBS AG that is alleged in the complaint is really in connection with what the complaint says is another Madoff-related investment, that is no -- meaning, not Luxalpha and Not Groupement Financier. When they tried unsuccessfully -- certain employees in London tried unsuccessfully to conduct diligence on Madoff and to have a meeting with him. Apparently, the meeting never happened and so there was no contact. Certainly no jurisdictionally relevant contact that relates in any way to the subsequent transfer claims at issue here.

The last and only other potential argument the Trustee has made about U.S.-directed conduct by UBS AG is that UBS Luxembourg, which is that company I mentioned that we are not moving to dismiss on behalf of -- at least not on jurisdictional grounds -- maintained a bank account at a UBS branch in the United States, and UBS Luxembourg used that account to pass dollar-denominated transactions to and from Madoff on behalf of Luxalpha.

It's not alleged that UBS AG initiated any of those transfers. It's merely a bank at which someone else used their account to make transfers in and out of that account. I don't think that could be deemed purposeful availment by the bank in all of the activities of their -- I don't think there's any basis for arguing that a bank purposely avails itself of all the transactional activities that its customers engage in using bank accounts that are maintained at that branch.

And, importantly, and I'll come back to this later in my argument -- but the complaint, it's almost impossible to make a determination as to UBS AG that any contact with the United States -- any of these contacts relates to the claim that is being brought here because the claim that is being brought here is to recover subsequent transfers and there is no allegation that UBS AG ever received a subsequent transfer of money that originated at BLMIS. I'll

come back to that in a bit when I discuss the failings of the complaint on 12(b)(6) grounds. But it's relevant also for jurisdictional purposes because the only way jurisdiction, specific jurisdiction, could be deemed to exist is if there is purposeful availment and U.S.-directed conduct and that conduct relates to the claim at issue. And we don't even know what the subsequent transfer is so it's impossible to make that determination here as to UBS AG.

One other point about UBS AG that's addressed in the briefs. The Trustee argues that UBS AG waived its right to challenge personal jurisdiction because back in 2012, when the Defendants first moved to dismiss the original complaint, I believe, in this action, UBS AG did not include a personal jurisdiction argument at that time. As I mentioned, that occurred in 2012 at a time before the Daimler decision, which was decided by the Supreme Court in '14, and under governing Second Circuit law at that time, UBS AG was subject to general jurisdiction in the United States because it had -- even though it is a foreign company, headquartered overseas, it had branches in the United States. And under governing Second Circuit law at the time, that was good enough for general jurisdiction.

As Your Honor knows, that has changed given the Daimler decision which establishes that general jurisdiction only exists -- or with rare exceptions, only exists in the

place of incorporation or the principal place of business. So, today, there is no general jurisdiction of UBS AG. And the Second Circuit has held in similar circumstances in the Gucci America case, 768 F.3d, 122 -- and I'll just -- I'll read the quote. It's directly on point.

"A defendant does not waive a personal jurisdiction argument if the argument that the Court lacked jurisdiction over the defendant would have been directly contrary to controlling precedent in this circuit." And that is certainly true of what occurred at the time of that very first motion to dismiss in this case. UBS AG would not have had an argument to dismiss for lack of jurisdiction so it can't be deemed to have waived that -- where it now does have that argument and has asserted it at its first opportunity.

Next company to talk about is UBS Fund Services Limited, referred to in the complaint frequently as UBS FSL, but I recognize that some of the abbreviations get a bit confusing so I'll try and use the full name, Your Honor. UBS Fund Services is a Luxembourg company headquartered in Luxembourg. It's alleged to have been the administrator for Luxalpha and Groupement Financier. And by that, the Trustee claims that the entity was performing day-to-day accounting functions, keeping the shareholder register, communicating with investors, preparing financial statements, calculating

the net asset value. You know, the day-to-day administrative services, as is hinted at by the name administrator, for those funds. But, importantly, all of those activities occurred in Luxembourg. None are alleged to have occurred anywhere in the United States.

In the Trustee's opposition papers he cites a single fax and four alleged phone calls with the United States over a four-year period. I will first say that the phone call evidence that the Trustee has submitted -- and that's at Exhibit 49 of the declaration that the Trustee submitted with his opposition papers -- is probably not even properly considered by Your Honor. This is a chart, I guess, that is headlined Log of Apparent Phone Calls between BLMIS and UBS SA or UBS FSL. It's purported to be authenticated by a lawyer for the Trustee, for Mr. Picard. I don't think it's appropriately considered on a motion to dismiss. It's not alleged in the complaint and I don't think it is appropriately considered on a motion to dismiss as -- as evidence of anything, honestly. The lawyer who purports to authenticate it authenticated it as a log of apparent phone calls so they can't even assert that there were. But even assuming that four phone calls were placed, if you total up the minutes, it's 13 minutes over four years is alleged. And there's nothing argued or presented that would connect these phone calls to any of the subsequent

transfers in this case, even if you considered these minimal haphazard contact with the U.S.: One fax and four phone calls over a four-year period.

There is no allegation in this case of any transfers of funds to or from the United States by Fund Services Limited, no meetings in the United States are alleged, no -- the Trustee, in his brief, relies on a case called Kromer for the assertion of jurisdiction over a foreign administrator of a foreign investment fund. But in Kromer, the fund at issue was created, managed and operated in the United -- from the United States. There were regular calls and countless mailings by the defendant at issue, by the administrator, with investors and others in the United States. And there is just nothing remotely like that alleged about UBS Fund Services Limited.

Third, Your Honor -- sorry -- is Defendant UBS Third Party Management Company, also al Luxembourg company, also headquartered in Luxembourg. It is alleged to have been the portfolio manager for Luxalpha from mid-2006 to late 2008. But that's it on the allegations about UBS Third Party Management Company. There's no allegations of any conduct, zero conduct at all by anyone at Third Party Management Company, much less any that were directed at the U.S. There's, again, no transfers of funds by UBS Third Party Management Company, either to the United States or

from the United States, no meetings in the United States, no communications alleged with the United States. The Trustee, in fact, alleges that UBS Third Party Management Company sat passively and didn't do anything. So, on that basis, there can't be purposeful availment of the privilege of conducting business in the United States.

Briefly, the Trustee does try to make an agency argument alleging that UBS Luxembourg -- again, that's the other Defendant that we are not moving on personal jurisdiction grounds -- arguing that the U.S. contacts of that entity should be attributed to Third Party Management Company, allegedly because of an advisory committee that was supposedly formed by UBS Luxembourg. But nowhere in the brief or in the complaint are there any allegations about what that advisory committee did or whether it had any U.S.-directed contacts, even if it could be attributable to Third Party Management Company.

And, as we point out in our reply brief, the theory that the Trustee has here seems to be backwards. They are alleging that UBS Third Party Management Company was the agent of UBS Luxembourg but yet they're trying to attribute the conduct of the principal to the agent, and that is not how agency jurisdiction works. All of the Trustee's jurisdictional arguments about these three entities boil down to what I said at the beginning, which is

the notion that doing business with an entity that does business in the United States is a basis for jurisdiction; not -- not based on the jurisdictional conduct -- conduct and contacts of the defendants themselves. And we think that just stretches personal jurisdiction too far and that the 12(b)(2) motion for lack of personal jurisdiction should be granted.

Moving to the merits, Your Honor, I want to address just a couple of items. I'm not -- we've moved on 546(e) grounds. Your Honor obviously has addressed that topic in any number of decisions. But there are some unique pieces here that have not been decided in any prior decision, including one important one, and that is the question of whether the Trustee has adequately pled that the fund Defendants -- the fund Defendants being Luxalpha and Groupement Financier -- had actual knowledge that BLMIS was not trading securities.

The Trustee concedes that 546(e) would -- is otherwise applicable, that all the prerequisites for 546(e) are met, but argues that he can avoid the safe harbor because of the so-called actual knowledge exception. So, let's just focus for a moment on what that requires. The actual knowledge standard is an extraordinarily high standard to meet. It's a requirement of a subjective mental state by the Defendant of "a high level of certainty and an

absence of any substantial doubt" that BLMIS was not trading securities. That comes from Judge Bernstein's Merkin decision in 2014. It is not enough that the Defendant had a strong suspicion of fraud; it is not enough -- certainly not enough that there were red flags that should have put someone on notice of the fraud. It -- it requires that the Defendant basically conclude a high level of certainty and no doubt that BLMIS was not trading securities.

If you look at the complaint here, that -- all that the Trustee really pleads is red flags or suspicions. These -- you know, these next few slides are just a series of excerpts from the complaint, from the second amended complaint here, which illustrates the most that the Trustee has. You'll see that -- you know, it says things like there are voices in the industry warning, there are serious concerns, there is a fraud risk. That's in Paragraph 156. On multiple occasions -- if you look at Paragraph 144, for instance -- people are alleged to have identified "red flags." You'll see serious concerns. You'll see skepticism up in Paragraph 247. Skepticism. You'll see warning signs, and you'll see people say that there is an opportunity for fraud. That's up there in Paragraph 234. You can see in 232 on the right hand side again alleging major red flags.

All of -- what's missing from the second amended complaint is any factual assertion that any of the

Defendants subjectively believed with a high level of certainty and no substantial doubt that Madoff was a Ponzi scheme. And, to the contrary, what you see in the quotes -- all we've relied on here are quotes from the Trustee and the complaint -- you'll see things like in Paragraph 155 on the bottom right hand corner, here's a UBS employee noting that Madoff is controversial. In this excerpt he notes that there are some oddities, there are things that are odd or different from the norm. The employee is unable to identify counterparties or having trouble identifying counterparties for Madoff. But what does it say? It says everything is probably fine. And that obviously is not a high -- high level of certainty that Madoff was committing fraud. That's noting some problems but having doubts.

Elsewhere in the complaint -- and I think this is really the Trustee's sort of -- the best and most -- their best argument that anyone noticed wrongdoing at Madoff concerns an investigation done by a consultant hired by Access, a fellow named Cutler, who did some diligence, did some digging and concluded -- and you see it in Paragraph 235 -- the strategy doesn't make sense. And what does he say? He says, it's possible that these are extremely sloppy errors or serious omissions in tickets. That's the best case. Arithmetic errors in the founder's strategy description. So, even in the coup de grâce of the Trustee's

argument, this Cutler investigation, he does not conclude with a high level of certainty and a lack of doubt that Madoff was not selling securities and was committing fraud.

I would say as you look at all of these and consider them holistically, the allegations here don't even approach the kind of allegations that the Trustee made in the Merkin case that Judge Bernstein decided, where he held that the Trustee had not -- had failed to plead actual knowledge. He held they satisfied -- I believe he held they satisfied the willful blindness test but that isn't enough. He held they had failed to plead actual knowledge. The complaint there included the same kind of allegations about the impossibilities of Madoff's returns and concerns about fraud, but the allegations there went even further. There were people who were saying that there was some probability that Madoff was a fraud and might be a Ponzi scheme. They had quotes to that effect from the defendants there. And even with those allegations, Judge Bernstein held that they constituted, at most, a strong suspicion of fraud but not the absence of doubt that's required for actual knowledge.

And so because the Trustee acknowledges the applicability of Section 546(e) but has failed to plead actual knowledge, that means that all of the transfers, initial and subsequent, prior to two years before the filing date are protected by the safe harbor and cannot be

recovered.

Lastly, Your Honor -- last topic I want to mention is insufficient allegations about -- about the existence of subsequence transfers. The Trustee needs to plead -- this is not a question that -- of simply difficulties the Trustee will have in tracing the funds from Madoff through the initial transferees to the subsequent transferees. It is true he will have that problem when we come to it but there are some glaring items that are simply impossibilities -- not difficulties -- impossibilities on the face of the complaint that require dismissal of some of the transfers.

So, first -- I mentioned this at the beginning -- there is no allegation that UBS AG received any subsequent transfer at all. In his opposition papers, the Trustee concedes that he must allege the pathways of the transfers, how they got from Madoff to the Defendant, and the who, when and how much of the transfers are at issue. And the Trustee tries to do this in Paragraph 3 -- Paragraphs 3 -- sorry -- 333 through 337 of the second amended complaint.

And if you look at those paragraphs, you will see that the Trustee includes a paragraph about each of the Defendants in this case, except UBS AG. He articulates the amounts he's seeking to recover and the pathways, or attempts to allege them, as to every Defendant, but there is no allegation in those paragraphs or anywhere else in the

complaint about transfers to UBS AG. And I would submit, Your Honor, that this is not simply an oversight on the Trustee's part. I think it was a deliberate decision. But, of course, there are consequences to deliberate decisions.

And for that, Your Honor, I would point you to the following: Back in 2015, the Trustee moved for leave to amend his complaint in this action, tendering a proposed second amended complaint at that time. And that is -- I'm showing Your Honor -- on the left hand side of this screen. It's Docket Entry 210 in this case. And you'll see there, the Trustee included a paragraph that said, based on the Trustee's investigation to date, the UBS Defendants received at least 97 million in subsequent transfers, including but not limited to the following. And it lists A, B, C and D. UBS SA received this amount, UBS FSL received this amount, UBS Third Party Management Company received this amount. And here are the rough dates of those receipts. And it included a Paragraph D, UBS AG received at least 4.2 million in recoverable subsequent transfers in the form of dividends paid by UBS SA and UBS FSL, which were comprised in part of fee amounts received from Luxalpha and Groupement Financier.

And so leaving aside for a moment the difficulties and implausibility of ever proving tracing in that circumstance, let's look at what the Trustee now alleges in the operative complaint in this case. And the corresponding

paragraph is Paragraph 333, which I mentioned a few moments ago, and that's on the right hand side here. And what we've done is run a red line of the currently operative complaint against the proposed amended complaint that the Trustee tendered a few years ago -- and you'll see most notably Paragraph D is no longer in there, and there is nothing else alleged anywhere in the second amended complaint that replaces it.

So, as such, the Trustee has failed to plead even the most basic requirements for a claim to recover subsequent transfers under Section 550 and, at a minimum, the claim against UBS AG needs to be dismissed, if not for personal jurisdiction, then for failure to state a claim.

And the last point, Your Honor, again, based solely on the allegations of the Trustee's complaint, a significant portion of the subsequent transfers he seeks to recover could not have originated with BLMIS. So, you'll note here that the Trustee alleges in 33(a) that UBS SA -- again, that's the acronym that's used for UBS Europe SE, now known as UBS Europe SE -- received at least 32.8 million in fees for serving as the official custodian and official manager of Luxalpha from February 2004 to August 2006.

Okay, fine. That's an effort to plead the subsequent transfers as to UBS Europe. But if you total up all of the initial transfers that existed on or before

August 2006 -- and this is pulled from Exhibit B of the second amended complaint, Your Honor, where the Trustee lists all of the transfers to and from Luxalpha and Groupe -- well, Luxalpha in this instance -- purports to list all of the initial transfers. And if you total up all of the initial transfers, you get -- as of the end of 2006 -- 16.2 million in initial transfers. That means that it is impossible that the 32 million that the Trustee seeks to recover in subsequent transfers for that period could possibly have been BLMIS customer property and initial transfers.

Again, the Trustee, down the road in this case, if it survives the deficiencies we've brought to your attention, is going to have a bear of a time tying initial transfers to subsequent transfers. But I'm not making that argument here today. That, I grant you, can be for another time. What we're focused on in this portion of the argument anyway is impossibilities, mathematical, physical impossibilities that 32 million in funds could have been subsequent transfers when only 16 million were initial transfers.

So, at least to the extent of that -- of the difference there, some $16 million, the complaint should be dismissed, again, if not for all the other reasons we've set forth in our papers. And I will, for all the other

arguments, rely on our papers, Your Honor, and I will -- I'm happy to answer any questions or to allow the other Defendants to address their issues.

THE COURT: Not yet. I'm -- I'm also considering -- if you'll let go as cohost so we can get back?

MR. KING: Oh, sure. Well -- yeah.

THE COURT: Yeah. I don't know how. Maybe she takes it away from you. I don't know what happens.

MR. KING: Maybe so. But I don't need to share anymore, that's for sure.

THE COURT: Ms. Usitalo, I want you to address the UBS argument and then we'll go to the other arguments. So --

MS. USITALO: Understood, Your Honor. Let me just ask -- our plan here today had been for me to address the issues on the 12(b)(6) points that are brought by all of the Defendants. And then my colleague, Ms. Stork, was going to address UBS's jurisdiction arguments. Would you --

THE COURT: I want to address those jurisdiction arguments right now because I, honestly, sort of lumped them altogether. And one of my questions was going to be explain the corporate structure of UBS and how it fits in with Access as you understand it. And so, this argument sort of bifurcates the argument. So, is Ms. Fernandez going to address this?

MS. USITALO: My colleague, Ms. Stork, is going to address the UBS jurisdictional issues.

THE COURT: Oh, I'm sorry. Ms. Stork.

MS. USITALO: So, I will turn it over to her.

THE COURT: Yes, Ms. Stork.

MS. STORK: Good morning, Your Honor. Okay, I think I fixed the audio. My apologies there. Good morning, Your Honor. I'm Victoria Stork, I'm an associate at Baker Hostetler, counsel for the Trustee, Irving Picard. I'm here today to argue in opposition to the UBS Defendant's motion to dismiss on personal jurisdiction. As you are aware, the Defendants have moved to dismiss, arguing a lack of personal jurisdiction against the entities -- the three entities, UBS AG, UBS Fund Services Luxembourg, which is often also referred to as UBS FSL, and UBS Third Party Management, often referred to in the papers as UBS TPM. And, together, I often refer to them as the UBS personal jurisdiction Defendants.

Your Honor, I think it's important to discuss, particularly after Mr. King's argument, that the standard on a motion to dismiss looks at the Trustee's well-pleaded, non-conclusory allegations and exhibits that are taken as true, and all inferences are to be made in the Trustee's favor. And, Your Honor, as the Defendants have displayed in Mr. King's demonstrate, they attempt to tease out each

individual contact that's alleged by the Trustee in attempts to rebut them on a one-by-one basis. This is not appropriate on a motion to dismiss standard.

The second amended complaint includes clear allegations with demonstrate that the claims the Trustee seeks to recover arise out of the UBS personal jurisdiction Defendants' activities. And the Trustee has asserted in the second amended complaint and highlighted in his papers how each of these Defendants engaged in business that's purposefully directed towards the United States and are subject to the jurisdiction of this Court. And all of these allegations are to be looked at in the totality of the circumstances. So, Mr. King's attempt to rebut each one of them is incorrect at this point in time.

The -- and as I will identify by going through each of the three entities, the Trustee has in a totality asserted that each of these Defendants does -- he does establish a prima face case of personal jurisdiction for each of them.

It's also important to identify that the UBS Defendants -- UBS AG, UBS Fund Services Luxembourg and UBS Third Party Management -- while we aren't aware of any individual investments that they made directly into BLMIS or Luxalpha, they were service providers for Luxalpha and Groupement. And as service providers they were maintaining

and carrying out activities on behalf of Luxalpha and Groupement. To make the argument that these entities were not directing anything to New York I think is incorrect. Each entity was an integral part of Luxalpha and Groupement. Luxalpha and Groupement could not make investments into or redemptions from BLMIS on its own. It needed the UBS Defendants in order to do this. Without the UBS Defendants, there would have been no investments, there would have been no redemptions. Luxalpha and Groupement would not have been able to operate. So, to say that they were just passively carrying out functions internationally is incorrect.

Further, the argument that these entities were international entities carrying out international contracts with no contacts to New York is incorrect. It does not matter that these entities were not based in the state of New York; what matters is that they were directing activities to the forum. The actions that they carried out outside of the United States were directed into the forum, and the impact and the injury to which the Trustee seeks to recover funds occurred in New York. The entities were not purely administrative and, Your Honor, it is completely reasonable the Defendants should be held into court regarding their conscious role of directing, developing and sending investments into BLMIS.

I'm going to go through each entity and go through

the allegations that the Trustee has pled to determine -- to show that we have shown in a totality of allegations that there should be personal jurisdiction over each. I'll start with UBS Fund Services Luxembourg. UBS Fund Services Luxembourg acted as the administrator for both Luxalpha and Groupement and was the management company and portfolio manager for Luxalpha. Additionally, UBS Fund Services Luxembourg did serve as the registrar and transfer agent, as we see in some of the Luxalpha documents.

They were responsible for keeping Luxalpha and Groupement's accounting -- account records, reports, financial statements and coordination with auditors, but were also responsible for doing things like keeping register of the shareholders, handling all subscriptions and redemptions -- those subscriptions and redemptions which were going to New York at BLMIS or coming from BLMIS in New York.

UBS Fund Services Luxembourg did work with Access on Luxalpha and Groupement's management supervision and administration. And actually in Luxalpha's answer, which it has recently filed and this Court can take judicial notice, Luxalpha admitted that -- and I'll quote; it's from Paragraph 68 of Luxalpha's answer -- that "UBS Fund Services Luxembourg worked closely with several of the Access Defendants in the management, supervision and administration

of Luxalpha." Further, they admitted that UBS Fund Services Luxembourg was responsible for calculating Luxalpha's net asset value based solely on the data that was provided by BLMIS with no independent verification. This is data that was coming directly from BLMIS that UBS Fund Services Luxembourg was retrieving in order to carry out the functions that they were required to carry out as the administrator of Luxalpha.

UBS Fund Services Luxembourg employees attended administrative meetings with Access to discover Luxalpha and Groupement. They participated in calls and email exchanges with Access employees. Mr. King did discuss the fax communication and the telephone calls between BLMIS and UBS Fund Services Luxembourg. The documents which the Trustee asserted -- which the Trustee can properly assert on the motion to dismiss based on personal jurisdiction are from the BLMIS records. And as the Trustee has identified in his papers, the Trustee does not have all of the records of Luxalpha, or Groupement, or the UBS Defendants. So, these are contacts that we are aware of that occurred and together come to create the totality of the circumstances. And here what we're seeing is that there numerous contacts where someone at UBS Fund Services Luxembourg was reaching out to someone at BLMIS directly, which is in New York. So, they were directing contact directly into New York.

Mr. King also discusses the fact that there's no transfers or funds to or from the United States alleged. The Trustee alleges that the UBS Defendants received transfers from Luxalpha or Groupement in return for fees for the services that they were providing. So, there were transfers that came through to the UBS Defendants that were originated from BLMIS.

All of the UBS Fund Services Luxembourg's actions with respect to Luxalpha and Groupement show that the UBS Fund Services Luxembourg's communicating, carrying out day-to-day tasks in operation of the funds, and carrying out tasks in furtherance of funneling investments through Luxalpha and Groupement make a prima face case that UBS Fund Services Luxembourg purposely availed itself of the New York forum, and the totality of its contacts permit this Court to exercise personal jurisdiction over it. Further, it's completely reasonable that Fund Services Luxembourg would be (indiscernible) to the Court when they were directing things in and out of New York.

Secondly, UBS Third Party Management. Third Party Management served as Luxalpha's management company from fall of 2006 through to the exposure of the fraud in November of 2008. They deliberately engaged in investment activity with BLMIS in New York and they earned substantial fees in connection with those activities. Additionally -- and I can

touch on this later when I talk about UBS AG -- there weren't numerous UBS AG employees that were members of the board of UBS Third Party Management. Third Party Management was officially responsible for all of Luxalpha's investment management decisions and, as we are aware, Luxalpha only invested in BLMIS. So, all of those investment decisions were into and out of New York in BLMIS. They received management and performance fees tied to Luxalpha's performance. And, like I just said, that performance was all directed to and from New York at BLMIS.

From the inception of Luxalpha until fall of 2006, UBS Luxembourg SA, which, as Mr. King stated, is now known as UBS Europe SE, was Luxalpha's manager. And a management company services agreement dated on September 22, 2006 transferred that responsibility of Luxalpha's manager to UBS Third Party Management. On the same day, there was an agreement for a constitution of an advisory committee, which was signed and dated between UBS Third Party Management and UBS Luxembourg SA.

Despite the switch in managers, UBS Luxembourg SA was still participating alongside UBS Third Party Management through this advisory agreement. Essentially, management by UBS Third Party Management was directed and assisted by UBS Luxembourg SA. All management decisions were directed -- were dictated by this advisory committee, and the advisory

committee was formed and staffed with UBS Luxembourg SA directors and Access principals.

Again, the Trustee's not privy to most of the books, and records, and documents of the Defendants at this time. However, the Trustee is aware that there was an agreement between UBS Third Party Management and UBS Luxembourg SA, which created the advisory committee; that the advisory committee was tasked with making recommendations in relation to the management and investment policy and strategy of the Luxalpha fund, and the advisory committee was staffed fully with UBS Luxembourg SA employees.

The fact that Third Party Management was to carry out its management duties under the advisement of an advisory committee signals that Third Party Management and UBS Luxembourg SA were working in concert. And the Trustee argues that the jurisdictional contacts where UBS Luxembourg SA is actively engaging with BLMIS and New York should be considered for UBS Third Party Management as well.

Finally, I will discuss the contacts of UBS AG. UBS AG served as Luxalpha's sponsor and promoter, and that is a more integral role than Mr. King was letting on. This isn't a case where UBS AG was simply behind the scenes shuffling papers, signing documents. They actually stepped in as a successor to BMP after BMP closed the Auriga Fund

and did not want to be participating in the Luxalpha Fund.

UBS was aware from day one that the role of sponsor and promoter for Luxalpha included things like seeking out and funneling investments into BLMIS, and that as it use its funds, the requirement of a sponsor and promoter plays an important role of the creation, structure, launch and management in the administration of the fund, which the Trustee does allege in his second amended complaint, Paragraph 166.

Under the applicable law and uses regulations, the role of sponsor includes playing a role in the complete oversight of the fund. And, in practice, it's typically the main shareholder of the management company or group entity to which the main shareholder belongs. And as I've previously stated, UBS AG is -- did have multiple employees that were on the board of directors of UBS Third Party Management, which was the management company of Luxalpha.

Additionally, UBS AG was responsible for viewing and approving options counterparties, as the Trustee alleged in Paragraph 265 of his second amended complaint, and every redemption from BLMIS came to UBS AG's Stanford branch to an account for UBS Luxembourg SA. As I previously -- all of these things together on a totality of the circumstances show that UBS AG was active and purposely directing activities towards New York.

Finally, one of the arguments that Mr. King and the UBS Defendants make is that there's limitless jurisdiction if we're hailing the UBS entities into court. This is not what the Trustee is seeking. We're not seeking to cast a limitless dragnet against all entities. We're not seeking to bring in the custodians or the individuals who are maintaining copiers at the UBS offices abroad. The Trustee is simply seeking to hold accountable the entities that were vital to the harm that occurred here in New York. They're not random. They were essentially parties who played vital roles. Each of these entities were key players who set up and serviced the defendant funds, Luxembourg and Groupement, and they are entities who we have claims against for taking fees from the defendant funds in exchange for the work that they carried out, which were directed straight into New York with the intention of investing with BLMIS.

In conclusion, Your Honor, we submit that the Court does have personal jurisdiction over the UBS Defendants, UBS AG, UBS Fund Services Luxembourg and UBS Third Party Management, as alleged in the Trustee's second amended complaint and highlighted in his opposition with the company (indiscernible). And at the very least, Your Honor, the Trustee should be entitled to jurisdictional discovery. Any questions I can answer for you, Your Honor?

THE COURT: Give me a moment to absorb what you

said. Just let me think a second.

MS. STORK: Absolutely.

THE COURT: I'm trying to figure out what you're saying about what monies did they get. Was this solely fees for investment advising and custodial services? Is that what you -- or was it more?

MS. STORK: My apologies, Your Honor. Just give me one quick second to think about this and get a good answer for you.

THE COURT: Sure.

MS. STORK: My colleague, Ms. Usitalo will talk more about that tracing, but what I can tell you is that the allegations that we have are related to the information that the Trustee has from contracts and documents where we're seeing that there are monies that were being transferred for the services that each of these entities were providing.

THE COURT: And so that's what you're saying jurisdiction is based on?

MS. STORK: That's what our claims are based on, yes.

THE COURT: The Court will take a ten-minute break.

MS. STORK: Thank you, Your Honor.

THE COURT: Or 15. Let's make it a 15-minute break. Chambers.

(Recess)

MR. KING: Your Honor, you're on mute if you're talking to us.

THE COURT: Okay. All right. I think I need the -- I need a question answered, Ms. Stork, and that is when, what, where of the money to UBS?

MS. STORK: Yes, Your Honor, one second. Let me just pull that information up right now.

THE COURT: Am I off mute?

MS. STORK: Yes, Your Honor.

THE COURT: And that's UBS AG that I'm asking...

MS. USITALO: Your Honor --

THE COURT: Yes, ma'am, you're good. I hear you. State your name, though, for the record.

MS. USITALO: Yes. Michelle Usitalo, Baker Hostetler for the Trustee.

THE COURT: Okay, okay.

MS. USITALO: And, Your Honor's question -- you were clarifying that it goes to UBS AG?

THE COURT: Right. I'm not clarifying. I need you to clarify.

MS. USITALO: I'm sorry. No, I was clarifying the question. I'm sorry.

THE COURT: Okay.

MS. USITALO: Your Honor -- and I can clarify it

for you. Because the Trustee does allege that UBS AG received subsequent transfers as a service provider, and that's in Paragraph 332 of the complaint where it says that -- I am pulling it up --

THE COURT: Well, I have it right here, but okay.

MS. USITALO: Based on the Trustee's investigation to date, the feeder fund Defendants subsequently transferred some of the initial transfers to the Access Defendants and the UBS Defendants, and UBS AG is included in that definition, as payment for their alleged service of the feeder funds. And, as Ms. Stork noted previously, Luxalpha has filed an answer in this complaint and Luxalpha in that answer has -- has admitted that -- that the UBS Defendants received payment of fees for their alleged services, and that includes UBS AG.

The Trustee has also alleged, as Ms. Stork noted, that UBS AG is a sponsor and promoter and as a result, received fees. And the Trustee has also alleged that -- that UBS AG is the parent company here. And the importance of that allegation and that relationship is that UBS AG would've received dividends from UBS SA. In the amount -- we don't have that yet because we don't have the books and records of Luxalpha, of Groupement, or of the UBS entities. So, that is -- that is where the Trustee has made the allegations of UBS AG in his complaint, and we believe that

these are allegations that are sufficient to put UBS AG on notice of the Trustee's claim.

THE COURT: Very good. Very good. Anything else, Ms. Stork or Ms. Usitalo?

MS. USITALO: Usitalo.

THE COURT: Usitalo, Usitalo. Anything else you all wish to add at this point?

MS. STORK: No, Your Honor.

THE COURT: Mr. King, anything you want to rebut on the UBS point?

MR. KING: Yeah. Just two quick things, Your Honor.

Number one, just to address the paragraph that Ms. Usitalo just pointed to, I mean, that's a classic conclusory allegation without any factual detail. It does not say that UBS AG in particular got any of the funds. Whereas you look at Paragraphs 333 to 337, it goes into great attempts to go into great detail about specific fees paid, dates and amounts paid to the other defendants. It's just absent. It's just a conclusory lumping in allegation that fails even to even relate, Your Honor.

The second point just to mention on the jurisdictional issues is I don't think Ms. Stork said anything that I didn't say to Your Honor earlier, namely these are three foreign entities that performed services for

companies, for foreign companies that themselves invested in the United States. Luxalpha and Groupement Financier invested with Madoff, at least according to the allegations.

All that is alleged, whether you take it individually or collectively and holistically as Ms. Stork wants you to, is that these UBS defendants provided services abroad to those entities that were doing business in the U.S. And I think the question Your Honor will have to answer is is that good enough to assert personal jurisdiction over those defendants. And I submit that the law doesn't permit that. Thank you.

THE COURT: Very good. Okay. Now where are we? We had UBS. And now Access.

MR. PACCIONE: Yes, Your Honor. Anthony Paccione on behalf of the Access defendants.

THE COURT: The Access defendants?

MR. PACCIONE: So I identified those defendants earlier on.

THE COURT: You did. Then let's just say you referred to them when you put your name on the record. And then we can go from there.

MR. PACCIONE: That's correct, Your Honor. And so I think for today's purposes, with the Court's permission, we did move on behalf of the Access defendants on a number of grounds. But I think for today, I just want to address

the jurisdictional arguments given the confusion and some of the questions that have arisen already. And those jurisdictional arguments are only on a subset of the Access defendants. And those include -- and we referred to those as the JMDs, the jurisdictional moving defendants in our brief. But the three entities that I want to speak about and try and clarify in terms of the rules that they serve include Access International Advisors LTD, Access Management Luxembourg SA, formerly known as Access International Advisors Luxembourg SA, and Access Partners SA. And what I'd like to --

THE COURT: Let me interrupt you.

MR. PACCIONE: Sure.

THE COURT: Because I will tell you I have questions. And let me give you those questions. And you don't have to answer them, but I want you to keep them in mind. Okay?

How did the feeder funds work? Was the money paid to UBS or directly to Luxalpha? The feeder funds are the initial transferees. If so, how did they get their knowledge, through Mr. Littaye or Mr. Villehuchet only, or additional defendants? And you need to take me through those as you give your presentation. Okay?

MR. PACCIONE: Okay, Your Honor. Let me start with that very broadly. The feeder funds, the two separate

feeder funds which include Groupement and Luxalpha are foreign feeder funds. They were set up, one, Luxalpha as a SICAV, S-i-c-a-v, and Groupement as an entity. Both, again, offshore and foreign.

They're investors. The people giving the money over to those funds are all foreign investors. And I'm not sure that was clear from any of the prior presentations. So we have foreign investors making investments into foreign funds.

At that point, Your Honor, what happens and how are those funds administered? The UBS entities have certain roles. The access entities that I am about to speak about have certain roles. These entities are all separate, distinct corporate entities serving different functions. Some are administrative, some are advisory, some are management related, but they all serve different functions. And the point I want to echo is --

THE COURT: Well, let me ask you one other question then. Is there any evidence that they had any money that was not BLMIS money?

MR. PACCIONE: Who is the they, Your Honor, in that question?

THE COURT: All your feeder funds that you're dealing with -- that you're representing.

MR. PACCIONE: So as to the feeder funds, they

were to the best of my knowledge a hundred percent invested in Madoff. As to those two feeder funds, as to Groupement and Luxalpha. So I don't think there is a dispute about that.

I do want to say this. That the business of Access and all of the Access entities was not solely with regard to those two feeder funds. The trustee admits in their allegations and the complaint that Access' business wasn't just Madoff. Access' business included 10 to 15 other funds as set forth in Mr. Littaye's affidavit that were not Access related. And so they had other business dealings. Those other business dealings with those other funds basically operate out of the New York office. And a separate entity called Access International Advisors LLC, they were a Delaware LLC operating in New York dealing with those other 10 to 15 other funds.

THE COURT: Were those funds segregated? Were the funds from those entities segregated from BLMIS funds?

MR. PACCIONE: Yes. They are completely separate funds with separate investors --

THE COURT: So they're easy to show then, or relatively easy to show. Okay.

MR. PACCIONE: Yes, Your Honor. Okay. So let me get to the point I think that's at the heart of the motion on jurisdictional grounds, and that is dealing with the

three Access entities that identify -- and I'll go through each one of them specifically as to what they did. But like the UBS entities, Your Honor, these were service providers, providing services outside of the United States to funds that were located outside of the United States to investors that were located outside of the United States. They did not -- they were not investors. These were service providers collecting fees, which fees were paid outside of the United States. And so these were completely foreign entities providing foreign services and receiving fees. Most of the fees if you look at the chart actually weren't even directly from the feeder funds to the Access entities, but they made their way through to UBS entities, who were all foreign, and then turned over to Access to some degree.

So these were, again, purely foreign funds. Not investors, who were simply collecting their fees for the services that they rendered. So the question then becomes what did each one of these three Access entities do and where were they located?

I'm going to start with Access International Advisors LTD. We'll call them Access LTD. That's a Bahamas limited company with registered offices in the Bahamas. They had their own bank accounts in the Bahamas, their own separate board of directors acting outside of -- acting in the Bahamas by resolution. They had their own separate

ownership. This is a purely foreign firm. And this is what the trustee alleges it did.

ATD -- according to its own -- I'm reading from Page 22 of the Trustee's brief, Your Honor. It said AIA LTD was required to keep the net assets of the funds under surveillance and constant review and carry out reviews and controls of the portfolio and served as Luxalpha's official consultant and exclusive introducing agent for potential investors in Luxalpha. And they quote to Paragraph 89 of the second amended complaint.

Those service, Your Honor, dealing for example with foreign investors are all rendered outside of the United States. They do -- as to communications with the -- as for all of these entities, the three entities that I'm about to talk about, of the 4.5 million documents that Access produced to the trustee, they found a single fax from AIA LTD that was sent to BLMIS in connection with requesting that reports be sent to the New York office for Madoff. A single fax. None of the phone calls or the purported phone calls that are listed. A single fax out of 4.5 million documents that Access produced. They have all of Madoff's records, and they have records that UBS produced. From those productions, this is the connection that they're trying to hold this Bahamian company into the United States on the basis of a single fax in connection with services,

again, all rendered offshore.

So, Your Honor, turning then to the second entity that I want to talk about. These are Luxembourg entities. And that's Access Management Luxembourg SA. It was known as Access International Advisors Luxembourg SA. For today's purposes I think we can call them AIA Lux. And what AIA Lux is alleged to have done is they had -- they served as investment advisor under advisory agreements, the advisory agreements governed under foreign law, signed and executed outside of the United States. And they were to verify investment policy was effectively implemented through the review of trade tickets and advising or making recommendations as necessary to Luxalpha's management company.

So what that means is that at times some of the Access entities weren't even advising the funds directly, but rather were advising some of the UBS entities as necessary. And so their role was even again further removed from the United States. Again, not potentially even demonstrating a purposeful availment of their willingness to beholden to a court hearing in the United States.

That entity did not direct any investments to the United States. It had no contacts with the forum. It could not make decisions on behalf of the fund. And so as a result, Your Honor, it never distributed or received funds

on behalf of the investors of the funds. This was a separate entity providing advisory services offshore. And again, insufficient as a matter of law, Your Honor, as we describe in our brief, to demonstrate that it too could be beholden to the United States on jurisdictional grounds.

The third entity -- third and last -- I'm sure you're thankful for that -- is Access Partners SA, which we describe as AP Lux. It's a Luxembourg entity. It too served as Luxalpha's investment advisor for a period of time from February 2007 until it liquidated. It was also designated as Groupement's investment advisor. And based on the trustee's own allegations, AP Lux was responsible for advising Luxalpha's portfolio managers, UBS, TPM, and AML -- so again, one step removed -- with regard to investment recommendations. And it was -- AP Lux was entitled to receive a portion of management and performance fees from Luxalpha's portfolio manager, not Luxalpha directly. Again, one step removed. And that just -- again, their own allegations demonstrate that the monies did not flow directly from the funds, but even from foreign UBS entities.

At some point, AP Lux was also a nominal advisor, Groupement Financier, for which it received some fees as well from Groupement's investment manager, not from Luxalpha.

These contacts, Your Honor, unquestionably

relationships between foreign entities and actions taken wholly outside of the United States. They are not -- they may have helped build the scaffolding for, as the trustee said, for these foreign funds, but that construction work was not done in the United States. It was all done outside of the United States, either in the Bahamas or Luxembourg. And there was no expectation that these entities who received fees outside of the United States for these services outside of the United States could behold into the United States to return those fees for services that they properly rendered.

That brings us to the -- so that ends the entity discussion, and that brings us to an individual, Patrick Littaye, who is an individual defendant. We do move on behalf of Mr. Littaye to dismiss on jurisdiction of grounds. Mr. Littaye is a French citizen. He resided either in France or Belgium during the relevant period and operated in various capacities. But his principal work was done outside of the United States in Europe.

In order to bring Mr. Littaye into U.S. jurisdiction, the trustee points to his ownership in some of the Access entities and also the fact that he was a corporate officer or director of some of the Access entities. And, Your Honor, in our brief, we argue that the ownership of some portions of entities is not sufficient for

jurisdictional purposes unless the corporate veil is pierced. And we go through great lengths to demonstrate that these corporate entities observed all of their formalities.

With regard to his role as a corporate officer, the Court would not have jurisdiction over him as his role as a corporate officer unless the corporation was acting as his agent rather than vice versa where he is acting as agent for a corporation. And so for those reasons, those two prongs don't work.

So the trustee then asserts a third prong and a third argument. And that is Mr. Littaye did attend meetings in the United States from time to time in connection with Access broadly speaking. Those meetings did take place in New York.

Pursuant to Mr. Littaye's affidavit, those meetings were sporadic. They dealt with the US-based business -- I mentioned the 10 to 15 non-BLMIS funds -- and were not related to work for the four Luxalpha or Groupement. They certainly weren't related to subsequent transfers that were made.

And so to the extent that Mr. Littaye had meetings in New York, there is no sufficient demonstration that those causes of action for subsequent transfers made to him, which went from BLMIS to the feeder funds mostly through UBS to

some of these other foreign Access entities and ultimately to Mr. Littaye is insufficient to demonstrate jurisdiction over him personally.

And I do -- I should mention for Mr. Littaye, he also was not an investor, not an investor in either Groupement or Luxalpha, but he was an investor in Madoff through some other funds that's not alleged in the complaint. But in his affidavit, Mr. Littaye says how he lost millions of dollars through that investment. So to the extent that people are trying to create Mr. Littaye as having actual or any kind of knowledge, he wasn't very successful since he lost millions of dollars in these other investments with Madoff to everyone's shock and surprise (indiscernible) went under.

The final point, Your Honor, that I think I need to address in connection with jurisdiction is I think the trustee recognizes the difficulty in proving jurisdiction on an entity-by-entity basis, that the conduct is extraterritorial and not sufficient to haul those folks into the United States.

So what they have tried to do to get around that is what I'll call, you know, to demonstrate that the jurisdictional moving defendants were mere departments of the Access New York entity, that they try and basically pull away the corporate separateness of all of these entities.

And, Your Honor, we went through a fair amount of work to demonstrate how there was a distinct structure between these entities. For the Court's purposes, we submitted exhibits which show charts. And I think that's the simplest way for the Court to see the difference between these entities. For Access Limited, it's Exhibit 40 to Mr. Littaye's affidavit. For AML, it's Exhibit 19, and for AP Lux, it's Exhibit 8. And when you look at those exhibits -- and we did have the supporting proof behind those -- they demonstrate a number of things that prove that there should be no collective jurisdiction, a piercing of the corporate veil so to speak.

Each one of those entities had their own separate constituted board of directors that conducted their business outside of the United States. Each one of those entities had offices in their respective jurisdictions, either in the Bahamas or Luxembourg. Each of those entities had separate contracts with their own separate providers and bore their own share of expenses. They had independent and different management teams, they had sperate bank accounts. Each of those entities were not financially dependent on Access LLC because they all earned their own fees.

And so as a result, when you look at the caselaw, Your Honor, as to common ownership, of which there was none -- there was some overlap -- the trustee cannot establish,

and I quote, "The nearly identical ownership interest that must be found before one corporation can be considered a mere department of the other." And that's citing the Levant Line case, 166 B.R. 221.

The ownership of Access LLC and AIA Inc. on the one hand and the ownership of each of these other access entities, the moving entities on the other, are neither nearly identical nor do they have the degree of commonality needed to satisfy a mere department showing.

There is also the financial interdependence that's not existent, as I said before. These entities operated separately, had their own monies coming in, had their own contracts with service providers, et cetera, going out. They observed their corporate formalities. Each one had their own independent directors that did not overlap with either AIA Inc. or AIA -- or Access LLC, the New York entities. And there is some executive overlap that did exist. But that's far below the mirror image symmetry required to support mere department status. And I'm quoting from the Reers v. Deutsche Bahn AG, 320 F.Supp. 2d 140 (S.D.N.Y. 2004).

And then there's the final point that to try and get mere department showing, as the trustee talks about the joint marketing, that somehow there are portions of websites which talks about access globally. But the Courts have been

pretty clear that showing the joint marketing in those efforts and not segregating every corporate entity when doing marketing is insufficient to demonstrate mere department status.

And then finally there is arguments about agency and that the foreign principal has to exercise some element of control over the in-state agent. But the trustee has actually done the opposite and the trustee argues and claims that each of the moving entities, the foreign entities, was controlled by Access LLC or AIA Inc. And I'm citing to the opposition brief at Pages 9 to 14 and also Page 17.

And this U.S. agent supposedly did not have the authority to contractually bind the foreign entities and the agent was not primarily employed by the foreign defendant and did not engage in similar services for these entities. The services that were rendered, again, for Groupement and financier and Luxalpha all took place outside of the United States.

So, Your Honor, with that, I believe that on the jurisdictional grounds, the claims against the foreign service providers and Mr. Littaye individually should be dismissed on the basis of lack of personal jurisdiction.

With that, Your Honor, I will rest on my papers with regard to the other arguments.

THE COURT: And who is doing rebuttal?

MS. FERNANDEZ: Good morning, Your Honor. Jessica Fernandez, associate of Baker Hostetler, counsel for trustee, Irving Picard.

I will be arguing on behalf of the trustee in opposition to the Access defendant's motion to dismiss for lack of personal jurisdiction. Defendants, Access International Advisors Limited, Access Management Luxembourg SA, Access Partners SA, and Patrick Littaye all moved for lack of personal jurisdiction while Access International Advisors LLC did not, as it is based in New York.

Defendants challenged the sufficiency and accuracy of our allegations by trying to argue that the various Access entities were actually separate and distinct. Looking at the totality of the circumstances, by viewing the pleading in the light most favorable to the Plaintiff, the trustee has made a prima facie showing that jurisdiction exists over defendants by sufficiently alleging that the Access entities are subject to this Court's jurisdiction as mere departments of Access International Advisors LLC and Access International Advisors Inc., its predecessor, both located in New York.

Defendants argue that the Trustee only points to contacts among foreign entities and actions taken or performed outside of the United States. Their complaint sufficiently alleges the contrary. Littaye has had a long-

lasting relationship with Madoff since 1985. Stemming from that relationship, Littaye and Villehuchet created a series of investment companies, the Access defendants, which operated as a single business entity. And that same entity created and serviced the funds, Luxalpha and Groupement among others, to direct investments in BLMIS in New York. The primary purpose of these entities was to receive fees for servicing those funds. To the extent they had any corporate duties, they were performed by Access personnel in New York because the Access entities were shell companies with no regular employees.

There was an absence of formalities as well among the entities. One Access entity often acted on behalf of another and the employees of Access entities performed work across all the entities without regard of which entity formally employed them. Access and its employees also commonly used collective names such as Access or AIA Group, emphasizing their operation as a single business entity.

The trustee alleges the absence of formalities amongst the Access entity stemmed from the entity's common ownership with both Littaye and Villehuchet, who as we alleged, completely or nearly completely owned, controlled, or dominated the Access entities. The Access entities were present in New York through Access International Advisors LLC and Access International Advisors Limited.

This very same issue has actually been litigated in this jurisdiction in SPV Osus Ltd. v. AIA LLC, an action stemming from the Madoff fraud where Judge Rakoff found that what plaintiff pleaded was enough to make a prima facie showing of jurisdiction over the very same Access defendants as they were mere departments of Access International Advisors LLC and found that the requirement of common ownership of these Access entities was satisfied.

Here, the trustee has adequately pled that the Access entities were mere departments of Access New York. Even if the Access entities are not viewed as mere departments of Access International Advisors LLC and Access International Advisors Inc., this Court should still emphasize specific jurisdiction over each of the Access defendants because they directed investments in BLMIS in New York.

These Access entities created, marketed, promoted, serviced the funds, and these entities did everything to direct and create the opportunity for investments into BLMIS. The Access entities created numerous funds, including Luxalpha and Groupement, and channeled over $2 billion into BLMIS through these funds. It is undeniable that Littaye and the Access entities directed investments into BLMIS, received redemptions from BLMIS, and earned fees for the services they provided to those funds such that they

purposely availed themselves of the benefits of investing in New York.

Mr. Paccione argues that the Access defendant had other on-BLMIS business. But what he omits to say is that 92 percent of Access revenue stemmed from BLMIS investment.

I will now turn to the specific allegations against each Access entity to establish they directed investments into BLMIS in New York.

As for Access International Advisors Limited, it was Luxalpha's official consultant and exclusive introducing agent. It was also Groupement's investment manager, operator, and investment advisor. As investment manager, Access International Advisors Limited was required to keep the net assets of the funds under surveillance and constant review, carry out reviews and controls of their portfolio. The purpose of this entity was to be an offshore entity that was a money box set up to receive fees on behalf of Access.

Mr. Paccione points out to a communication with BLMIS and this entity. That further undercuts the false suggestion that New York Access entities were only involved with non-Madoff funds.

As for Access Management Luxembourg SA, it was nominally Luxalpha's portfolio manager. It had to promote the fund, solicited subscriptions, and receive (indiscernible) redemptions. It was also Luxalpha's

portfolio advisor, advising UBS SA in connection with its role as Luxalpha's portfolio manager.

As for Groupement and Groupement Levered, it acted as its investment advisor.

Access Partners SA was the investment advisor to Luxalpha. It was also the nominal advisor of Groupement Financier and Groupement Levered. It was created to protect Luxalpha and BLMIS from U.S. regulatory scrutiny at the request of Madoff. Each Access entity received fees for the services they performed for the funds, and the trustee is seeking those very same fees.

As to Littaye, the Trustee has sufficiently pled that he had numerous substantive contacts with New York that establish this Court's jurisdiction over him. Mr. Paccione again argues that Littaye's meetings in New York were sporadic and not related to their feeder funds or BLMIS investment. (indiscernible) is a factual issue, and our complaint sufficiently alleges the contrary. As the trustee alleged, Littaye made quarterly visits in New York to visit Madoff. He attended Access quarterly strategic meetings in New York. He made sure that he was the sole point of contact between Access and Madoff. He also closed down the 2006 Chris Cutler investigation in New York himself. Any issues, questions, or concerns regarding the several access funds that maintain accounts with BLMIS were addressed by

and had to be run through Littaye. Littaye coordinated, dominated, and controlled Access, serving as a director and executor for all the Access entities and sat on the board of directors of both Luxalpha and Groupement.

In isolation, these contacts would be sufficient to support jurisdiction. In their totality, they undeniably establish that Littaye purposely directed his activities to New York.

Judge Rakoff, again in SPV Osus, already found that Littaye's quarterly meetings with Madoff in New York and his efforts to shut down discussions of BLMIS irregularities in a 2006 meeting in New York were more than sufficient to make a prima facie case of jurisdiction over Littaye. The trustee alleges the same facts as well as numerous others that support specific jurisdiction over Littaye. The trustee's underlying claims arise out of or relate to Defendant's contacts as the trustee seeks to recover the fees the Access defendants received for the services provided to the funds for directing investment in BLMIS in New York.

In conclusion, Your Honor, the Trustee has made a prima facie showing of jurisdiction over each of the Access defendants. And at a minimum, the trustee is entitled to jurisdictional discovery as the trustee has put forth a reasonable basis for jurisdiction over defendants.

I know that Mr. Paccione has gone into detail as to the amount of documents produced to date. And if Your Honor would like me to get into that production, I can do so. And if not --

THE COURT: Wait a second. I would like a summary of what you received. There is one thing to have volume. It's another thing to have detail. So tell me what you've got.

MS. FERNANDEZ: Exactly, Your Honor. Although Access is throwing a high number of documents produced, they only produced electronic documents from their New York server. And that included a lot of spam emails and non-relevant documents. That production also did not include any paper documents nor the books and records of the other Access entities. And we have been in communication with Access counsel regarding the production, and they let us know that they had already preserved documents in Europe. And to date we have not received those documents.

THE COURT: Mr. Paccione also said something about that Mr. Littaye was a loser. Is he a net winner or is he a net loser? Do you know, Mr. Paccione, do you know?

MR. PACCIONE: In his affidavit -- declaration that he submitted, he declares that he was a net loser, Your Honor. But a net loser -- he invested, again, not through Groupement or Luxalpha, but through another feeder fund.

THE COURT: But he has profits through his fees, right?

MS. FERNANDEZ: Yes, Your Honor. And that's what we alleged.

THE COURT: Okay. Rebuttal -- not just rebuttal, but anything you want to add?

MR. PACCIONE: Yes, Your Honor. I have a couple of points. I just want to make sure that -- there was a reference to -- and I want to focus on the Access entities for a moment. There was a reference to one of them receiving subscriptions or dealing with subscriptions and investments. Your Honor, that's not dealing with the redemptions, for example, from Madoff to the feeder funds. Rather, these are the entities that interface with the foreign investors in Groupement and Luxalpha. So the reference -- there is no allegation still, notwithstanding what we just heard, not a single allegation of any conduct by the three corporate entities that we've been talking about that took place in the United States. Not a single one.

With regard to the SPV Osus decision that's been bandied about, Your Honor, that was not a subsequent transfer case. It wasn't a bankruptcy case. It was a tort case. The court -- the phrase that's being quoted was pure dictum. He did not rule on jurisdictional grounds on that

particular point. He said in dictum given what I'm hearing, there may be a need for discovery and a hearing on this jurisdictional aspect. But again, that was a different case, different claims, some different parties. And most importantly, Your Honor, in that case, the plaintiffs did not have access to the millions of documents that have been produced to the trustee like here. And so Judge Rakoff, if he was thinking about jurisdictional discovery, it was in that context.

As to that document issue, Your Honor, there were indeed 4.5 million documents. Because what we did was we turned over -- my firm, before I took over this case, turned over the entire server that was in the New York office. So it was -- it did include junk email. But we said here, you want it, you can have it. And we gave them everything. We did make hard copies available. Notwithstanding what I heard from counsel, those hard copies were actually scanned and part of the production as based as what we know.

And in terms of other documents outside of the United -- so if the trustee wanted to see what communications were had from the foreign entities to the New York office, they have the source of that. They have the source because they have the entire New York server. There is no need for jurisdiction to find who else -- what else was sent directly to the New York office.

To the extent that they want to see communications directly to Madoff in New York, well, they have access to that because they have tens of thousands of boxes, not to mention scores of data from Madoff to also demonstrate what contacts were made from Access Europe to Madoff directly.

So this notion that somehow there's jurisdictional discovery that's needed really just doesn't fly, Your Honor. They have everything that they need.

And it also undercuts, Your Honor, if they're saying that the New York documents weren't sufficient, then it sort of suggests that the New York entities weren't the center of the universe for these foreign funds. If they were, then they would have seen everything that they need to see. This proves that the efforts and the energies and the services that were provided and the monies received all took place outside of New York and all took place offshore in Europe, Your Honor. So as a result of that, I think our jurisdictional arguments -- I think we could rest on our papers.

One other point in terms of employees and shell companies. There were references to that. I think we disproved that in the underlying papers in terms of separate directors, existing bank accounts, fees being earned. And there are times -- and there's a case cited on Page 11, Footnote 9, where sometimes employees at times perform work

for other entities and had multiple email addresses. But that's enough to disregard the corporate form. And that's the (indiscernible) case on Page 11, Footnote 9.

So, Your Honor, unless the Court has any other questions, we will rest.

THE COURT: Anything anyone wishes to add on the Access, Littaye, and Villehuchet? Yes, ma'am.

MS. FERNANDEZ: Nothing from me, Your Honor.

THE COURT: Well then now we are at the motion to dismiss by Theodore Dumbauld.

MR. KNUTS: Good afternoon, Your Honor. Again, it's Robert Knuts from the Sher Tremonte firm for Defendant, Theodore Dumbauld.

Unlike the prior arguments, I can say that Mr. Dumbauld is fully subject to this Court's jurisdiction as an American. In fact, a graduate of the Naval Academy. So I won't be talking at all about jurisdiction.

THE COURT: Okay.

MR. KNUTS: In our papers, the motion to dismiss, we presented several arguments in favor of that motion. I want to focus my time today on one of those. And that is the employee compensation issue.

At Page 29 of our moving brief, we quoted from a case called Geltzer, which concluded that an officer or employee who is the recipient of a salary from a company

that received an allegedly fraudulent transfer is not without more the subsequent transferee of the conveyance.

The trustee addressed this argument in their opposition brief at Page 69 and essentially tries to rebut that in three ways. I mean, first, the Trustee claims that he is unable to confirm that the only money transfers made to Mr. Dumbauld were in the form of employee or officer compensation. But that --

THE COURT: Let me stop you right there, because that was one of my questions. Have you given that brief to the trustee?

MR. KNUTS: Well, back in the Rule 2004 days, we turned over all the documents they asked for. I assumed that on the server, the Access server it included, you know, payroll documentation and everything --

THE COURT: But you didn't break it out yourself and even make yourself aware of that. Basically where did the money come from if it wasn't from BLMIS, that's...

MR. KNUTS: Well, as the trustee has alleged in both the first amended complaint and the second amended complaint and as Mr. Paccione mentioned earlier, Access in New York had other services that they provided to clients relating to completely unrelated funds. You know, it had nothing to do with BLMIS. For example --

THE COURT: But you didn't break it out even for

yourself.

MR. KNUTS: In terms of -- well, first of all, by the time this case started, Mr. Dumbauld had long left the employment of Access. And I have not had the ability to go back into Access's payroll records to determine what percentage of income related to BLMIS versus --

THE COURT: Well, just so you know, because the trustee has alleged that only five percent of that business was not BLMIS. So I was just curious if you did that for your own sake or when you're making these arguments you too have already done your own research on this. And your answer is no.

MR. KNUTS: Without Access, I couldn't do the same research that Mr. Paccione could do or others. But I will point out, Your Honor, that there have been -- the Trustee has made different allegations about different time periods.

For example, in the first amended complaint, he alleged during 2005 that Access's BLMIS revenue was only 61 percent of its total revenue. And now in the second amended complaint, it does say by 2008 that it had grown to 92 percent. So it did vary over time.

THE COURT: Yeah, but I was just asking for your own sake, your arguments, if you'd looked. Okay. (indiscernible).

MR. KNUTS: Sure. Well, one thing I know for

sure, Your Honor, and that is the amount of revenues that were unrelated to BLMIS at Access more than covered the monies paid to Ted Dumbauld. That's absolutely for certain. I mean, the total -- they had revenues in excess of the $1.25 million that the trustee alleges was received by Mr. Dumbauld during the relevant time period and could involve subsequent transfers. We know for sure that there was a lot more money going through Access than that. But --

THE COURT: Of course he wasn't the only expense. But that's another point.

MR. KNUTS: Absolutely, Your Honor. But what I want to -- so a couple of things just turning back to this, a little hint in saying he doesn't have the ability to confirm that the only money received by Mr. Dumbauld was compensation, employee compensation. In fact, Paragraph 337 of the second amended complaint says that the $1.25 million wasn't, you know, officer employee compensation. So he cannot say in his opposition papers something that's inconsistent with the actual allegation in the second amended complaint. He's made the affirmative obligation that it was compensation, and he should be stuck with that. And actually, he is stuck with that because that's the section (indiscernible).

The second argument that the trustee makes concerning how he's not bound by the Geltzer case is that he

argues that the second amended complaint includes allegations that Mr. Dumbauld did not receive his compensation in good faith. But when you look at the allegations that he relies on on Page 69 and you actually go back and read those allegations that are in the second amended complaint, you'll see there's no factual allegation that Mr. Dumbauld ever acted in bad faith. The factual allegations concerning Mr. Dumbauld are he was given an assignment to analyze Madoff trading, he performed that assignment, he provided the results of his analysis to his superiors at Access. He was then told to get somebody else to take a look at the analysis. He did. He found who the trustee believes is extremely competent, Mr. Cutler, to conduct another analysis. And he then facilitated Mr. Cutler to report those results to the people at Access, his bosses.

There is nothing -- in every step of the way, Mr. Dumbauld did the right thing. He did the work honestly, he reported honestly. He described exactly what he learned. Mr. Cutler, he did nothing to interfere with Mr. Cutler, describing what Mr. Cutler learned. You know, there's no allegation in the second amended complaint that Mr. Dumbauld as an individual had any authority to do anything else at Access with that information. And so in fact there is no allegation in the second amended complaint that he acted in

bad faith in some way at any point in time.

And then lastly, the trustee makes the argument that it's unclear in some way whether the compensation that Mr. Dumbauld received as an employee and officer of Access was received "for value". Because he says that that's another ground for getting out from the Geltzer decision. But again, there is nothing in the second amended complaint that actually alleges that Mr. Dumbauld did not provide value for that compensation. It's just not there. And without an affirmative allegation saying that this was -- that services were provide for no value, you don't have a claim. It's just not the case that you can sort of say there may be other issues here. You know, you have to actually affirmatively say that there's an issue in a complaint in order to make a claim.

So I think the sum and substance of the Geltzer argument about employee compensation is that you can in fact under the right circumstances make specific -- as a trustee make specific allegations to put an employee's compensation in play as a subsequent transferee. But if Your Honor were to deny Mr. Dumbauld's motion to dismiss when there are no -- those type of allegations don't actually exist in the second amended complaint, then I think it could create a really problematic precedent for future Ponzi cases and future trustees. You know, they would be encouraged to name

other employees trying to claw back compensation just because the compensation was received during a time period when there was also initial transfers that could have flowed downwind. And it's not going to be just the Ted Dumbaulds of the world who are then subject to that kind of claim.

And so I would urge Your Honor to really hold the trustee's obligation, you know, hold them to the obligation that the Geltzer case said, which is if you've got actual allegations, specific factual allegations of bad faith or no value for the compensation, then okay, maybe you can tag an employee with possibly getting his compensation clawed back. But because that's not here, Your Honor should dismiss Ted Dumbauld from this case.

I mean, if you look at the second amended complaint on Page 83, they put together a chart showing all the funds flows and everything else. And there's Ted Dumbauld, floating somewhere on the page. You know, without any lines drawn to him, anything, just because he received compensation during a relevant time period. That's not what a subsequent transferee case should be involving an employee. And for the rest of our arguments, we'll rest on what we put in our papers. Thank you.

THE COURT: Rebuttal? Yeah, you were on mute. We didn't get your name.

MS. USITALO: Sorry about that. Michelle Usitalo,

Baker Hostetler, for the trustee, Your Honor. And I am responding to a few issues here under the arguments that the defendants have made on the 12(b)(6) issues.

I can address first some of the arguments that were just raised with respect to Mr. Dumbauld specifically and then I will turn to some of those other --

THE COURT: Did you not do that when we were having the argument earlier? I'm missing something here.

THE COURT: Yes. Sorry, Your Honor. No, I am addressing -- so it was -- Mr. King addressed the issues of the Trustee's allegations concerning actual knowledge and also generally the issues of the sufficiency of the Trustee's pleadings with respect to customer property for each of the defendants. And I know that we've touched on parts of the customer property issue already, but I did have some further joinders that apply to all of the defendants --

THE COURT: Okay. I'm a little flummoxed because I thought we addressed those at the time we were addressing them.

MR. USITALO: Apologies, Your Honor --

THE COURT: You're going to do the lumping.

MR. USITALO: Well, that -- apologies, Your Honor. As we were addressing the personal jurisdiction issue specifically with respect to each defendant --

THE COURT: Okay, all right. But answer Mr. Knuts

first.

MR. USITALO: Okay, I will do that. And I think as Your Honor pointed out, the issues here too are the fact that the Trustee has alleged in a plain statement in his complaint, which is all that's required at this stage of the litigation, that Mr. Dumbauld received the $1.2 million in transfers. And we allege that it was at least that amount in compensation. But to note, Mr. Dumbauld was also a partner of Access LLC and he was also the chief investment advisor. So there could be additional transfers there as well as a result of fees that Access received and their LLC received in their role.

But particularly too on the point with the fact that it is compensation that is being alleged, we did allege the more that Mr. Knuts was referring to. And I know he characterized it in a certain way, but that's not what is appropriate here. It's the Trustee's allegation that must be taken as true and inferences made in his favor. And the Trustee has alleged that when concerns were raised about Madoff's trading activity that Mr. Dumbauld, as Access's chief investment advisor, was asked to perform an analysis of that trading activity, and he could not confirm that the trading activity was taking place. And then when he was asked to get a second opinion and they hired Mr. Chris Cutler to perform a similar analysis, this resulted in Mr.

Cutler coming to Mr. Dumbauld and telling him -- and this is quoted in the trustee's complaint -- that if BLMIS were a new investment, he would likely shove it out the door.

Mr. Dumbauld was also present at the meeting where this analysis was presented to Littaye and Villehuchet. So there is the more here that is required. And the trustee doesn't have to prove those allegations at this point, just merely allege that there is more to just Mr. Dumbauld being an employee of Access. He was an integral part of Access and he had the more that is required here.

THE COURT: Excellent. And I apologize to you because I think I did basically let you reserve your jurisdictional rebuttal. And I took a break instead of listening to you. So I apologize.

MR. USITALO: No, that is no problem.

I will turn to the arguments that the defendants have made with respect to 546(e) and the --

THE COURT: You're talking about UBS now, right?

MR. USITALO: I am talking about UBS because they -- I'm sorry. UBS has made the arguments today, but --

THE COURT: Non-jurisdictional, right.

MR. USITALO: Non-jurisdictional, yes. All of the parties have taken -- made the same arguments in their papers as well as adopted the arguments of UBS. So I believe it was Mr. King who was presenting those arguments

today, but all of the Defendants participated.

THE COURT: Okay.

MR. USITALO: And since they didn't touch -- since Mr. King didn't touch on the legal arguments of 546(e) and Your Honor has already addressed those, we too will rely on our papers in that respect.

But I do want to address the defendant's arguments that the trustee has not adequately pled that Luxalpha and Groupement, the initial transferees, have the requisite actual knowledge that permits the trustee to pursue his claims for avoiding transfers beyond the two years.

And I know it's been mentioned already, Your Honor, but it's important again to emphasize that the standard here is that the trustee's allegations must be taken as true and all inferences made in his favor. And when that analysis is performed here, those inferences make out a plausible claim.

And we've discussed it quite a bit here today, but both Luxalpha and Groupement are groups that operated solely through their agents. And this includes the UBS defendants and the Access defendants that were acting as directors and service providers. And the trustee has alleged that the conduct and knowledge of those defendants should thus be imputed to Luxalpha and Groupement. And the trustee has also pled in his allegations that Luxalpha and Groupement

had actual knowledge that BLMIS and that the defendants knew that BLMIS was operating a fraud and that Luxalpha and Groupement's agents knew that Madoff could not be executing all the securities transactions he reported. Specifically, Luxalpha and Groupement knew, the trustee alleges, that the volume of options trades Madoff purported to execute on their behalf was impossible and that Madoff lied about the identify of his purported options counterparties and that Luxalpha and Groupement knew that the returns BLMIS claimed to produce were impossible given its stated trading strategy and that Luxalpha and Groupement knew that BLMIS reported trades as having been made at impossible times and prices and that these funds' agents were aware of signs of fraud at BLMIS and that Patrick Littaye actively impeded any inquiry into the signs of fraud by quashing and deflecting questions. And the trustee alleges that Luxalpha and Groupement's awareness of BLMIS' impossible trading activity and performance, demonstrable awareness of the fraud and the directors' and managers' deliberate actions to protect Madoff established defendant's knowledge of fraud. And the trustee goes on at length in his complaint to provide allegations in support of this.

And it's the trustee's position that all of those allegations that filled all of our screens when Mr. King was speaking amount to a totality of -- the totality of

allegations that amount to actual knowledge. And I note as well that some of those allegations that were up on the screen in those particular allegation callouts, there were allegations that the trustee has alleged that the defendants knew. I noted those parts weren't highlighted, but they were there.

And in going through the trustee's allegations, I think we first must begin with the allegations that the UBS and Access defendants deliberately deceived the Luxalpha -- sorry, the Luxembourg regulator, which was referred to as the CSSF, by failing to disclose BLMIS' multiple roles in the fund. Luxalpha, as we noted, has filed their answer in this proceeding. And in its answer, Luxalpha admitted that the purpose of the USITC's regulations is to protect against fraud, and the UBS defendants and Access defendants set up a structure for Luxalpha that was not in compliance with USITC's regulations, and the Access defendants knew this.

And how do we know they knew? Because the trustee alleges that Access had originally operated (indiscernible) another BLMIS feeder fund, with BNP Paribas acting as the sponsor of the fund. And in a meeting with Access, BNP said that BLMIS' role as both custodian and investment advisor was unconscionable, violated BNP's internal security rules, and Luxembourg law. And BNP proposed a path forward to address these concerns and said they either needed to

identify BLMIS to the CSSF or get real-time trading access from Madoff. Madoff said no, BNP said it would not go forward, and (indiscernible) closed. But Access moved on and opened Luxalpha without missing a day of investment with BLMIS. And this time, UBS acted as its sponsor.

In deliberately deceiving the CSSF and not identifying BLMIS' multiple roles for Luxalpha, the Access and UBS defendants aren't overlooking laws and regulations to make money; they are purposely circumventing laws meant to prevent fraud, to expose people like Madoff. And they aren't overlooking; the trustee alleges they are lying. Lying to the CSSF, withholding information to the SEC about whether or not they acted as a counterparty to Madoff, helping Madoff avoid SEC scrutiny by setting up an Access entity that purportedly acted as an investment advisor.

But why tell these lies? Why prevent Madoff from being exposed? Why go to such great length to perpetuate a structure that allows fraud? The inference that can be drawn here is that they did it because they knew. And this knowledge belongs to the funds, Luxalpha and Groupement, because it was their agents and their service providers that told these lies and that took these actions.

The trustee alleges that UBS and Access both had anti-fraud due diligence procedures in place. Did BLMIS go through these procedures? The trustee alleges it did not.

Why did it not? The inference that can be drawn here is because Luxalpha's service providers knew that BLMIS would not pass. Some due diligence occurred when someone raised a flag about Madoff's trading. And I mentioned this. And it was first Mr. Dumbauld as Access's chief investment officer that reviewed the trading activity and confirmed that the options trades purportedly being made by Madoff didn't appear in the database as they should of.

Then Access hired Chris Cutler to perform that analysis and other analysis, and he did perform that analysis. And as a result, Cutler recommended that Access exit all investments with BLMIS. And he shared the results of his inquiry with Littaye and Villehuchet. And what did they do? They cut Cutler's investigation short and suppressed his findings.

Now, I know the defendants in their papers and in their arguments today may offer alternative explanations for these conducts or these statements. But these explanations are not relevant at this stage of litigation where it is the trustee's allegations that must be taken as true. And the trustee alleges that Access and UBS defendants' conduct reflects their knowledge of Madoff's fraud.

And to give an example, UBS takes the Trustee's allegations of the knowledge of fraud and claims that these allegations just plead that UBS had different risk

tolerances. Again, this explanation is irrelevant, but it also opens the door for further questions. Risk of what? Risk that Madoff's fraud would be exposed? UBS's argument simply illuminates that perhaps UBS was willing to act as Luxalpha and Groupement's service provider because the potential for income was so great that it was worth it in the event that Madoff's fraud was never exposed. In fact, the trustee alleges that this was UBS's very thinking.

Business is business was an instruction from a Luxalpha director and UBS managing director. We cannot permit ourselves to lose $300 million. Accept client. The plausible inference from this statement was not that they didn't have actual knowledge of Madoff's fraud. Instead, that they didn't care if they did. And in any event, it presents a question of fact.

And defendants make a point about the trustee's allegations of red flags. But these allegations also serve to support the trustee's allegation of actual knowledge. The trustee does not list red flags in such a way that has been found in other cases to be insufficient to plead actual knowledge or willful blindness. The complaint alleges concrete examples of instances where the defendants recognized these red flags and saw them for what they were; evidence of trading that was impossible.

And as noted, neither Mr. Dumbauld nor Mr. Cutler

confirmed that Madoff -- could confirm that Madoff was making his options trades. Both Mr. Cutler and UBS noted that Madoff's strategy could not produce the returns reported. UBS identified out-of-range prices in a BLMIS trade confirmation and Access knew that the appointment of Friehling & Horowitz as BLMIS' auditor caused concern. And in response, Littaye gave the instruction, don't go further.

And with respect to counterparties, Chris Cutler noted, "I just can't find the other side of the trade." And when a Swiss private bank directly asked Madof to identify the counterparties, Madoff called Littaye with an explanation that Littaye didn't understand and Villehuchet asked the bank to stop contacting Madoff.

And when the SEC came to UBS in the U.S. and asked if one of its affiliates was acting as one of Madoff's counterparties, UBS told the SEC they would have to go ask the affiliates themselves.

THE COURT: I have a question.

MS. USITALO: Sure.

THE COURT: You keep talking about the UBS affiliates. Are you talking about SA, are you talking about AG? How are you -- link those for me.

MS. USITALO: So with respect to the review of the trading activity, it was UBS SA and the custodian and administrator that were reviewing those statements and

confirmations. So it's different allegations for each. There were instances where UBS AG was --

THE COURT: I know there were. But I have read every word of your complaint. And I want the answer to that question.

MS. USITALO: Which allegations we are alleging that UBS SA had -- sorry, which UBS entity had which knowledge?

THE COURT: Exactly.

MS. USITALO: Okay. So it is in -- UBS SA is the one that identified out-of-range trade prices in the BLMIS trade confirmations.

THE COURT: I want to just say something right now.

MS. USITALO: Okay.

THE COURT: Every time you use UBS, please be specific.

MS. USITALO: Will do, Your Honor. And I want to then clarify to you when I am talking about that -- I had made the statement that UBS noted Madoff strategy. That was UBS AG.

THE COURT: Okay.

MS. USITALO: And actually lastly, Your Honor, I was just going to make -- to note that Luxalpha, with respect to the counterparties, reported to its auditors that

BLMIS' option counterparties were approved by UBS AG, even though we know that could not be the case.

THE COURT: Explain that then.

MS. USITALO: Because there were no counterparties to approve.

THE COURT: Oh, okay.

MS. USITALO: And, Your Honor, just in conclusion with respect to actual knowledge, I think these allegations that I've just been through taken together and viewed in the light most favorable to the trustee satisfy the trustee's burden of alleging actual knowledge and support the trustee's ability to pursue claims to avoid the transfers made to Luxalpha and Groupement beyond the two-year period.

And so I would like to finally just go and touch on the arguments that the defendants have made with respect to the trustee's allegations on the recovery under Section 550 of the subsequent transfers. And at this stage what the trustee must do to move beyond the pleading stage and recover subsequent transfers from the defendants is to provide the defendants with a short and plain statement of the claim showing that the pleader is entitled to relief. And the trustee has done so by alleging throughout the second amended complaint that these defendants who acted in various capacities as service providers to Luxalpha and Groupement received subsequent transfers of BLMIS customer

property as service provider fees.

THE COURT: Again, you're lumping them all together, correct? You're not giving me which UBS we're dealing with.

MS. USITALO: In this instance, Your Honor, we are alleging that each one of the UBS entities -- so that would be UBS AG, UBS SA, UBS FSL, and UBS TPM all received fees as service providers to Luxalpha and Groupement. And I will try -- I apologize --

THE COURT: Make sure the record is clear.

MS. USITALO: Okay. As I believe Mr. Paccione said earlier, there's really no dispute here that a hundred percent of Groupement and Luxalpha's assets were invested with BLMIS and Luxalpha also in its answer admits this and admits that all of the UBS SA, UBS AG, UBS SFSL, and UBS TPM and all of the Access defendants as the trustee has defined them, AP Lux -- sorry, I have them all right here -- AIA Limited, AIA -- I want to -- AIA LLC, Access International Advisors Limited, and Patrick Littaye, Mr. Villehuchet, and Mr. Dumbauld all received fees as directors and service providers.

And what the Defendants are arguing here is that the trustee has not linked the transfers from Luxalpha to these defendants as originating as BLMIS customer property. Each defendant has disputed this. And UBS makes arguments -

- UBS SA makes the argument that it tries to force the trustee to perform a specific tracing exercise of linking the initial transfers made to Luxalpha and then to UBS SA as we saw with Mr. King on Mr. King's slide. But that is not what is required at the pleading stage.

In the complaint, the trustee need only show the relevant pathways through which transfers were received. And the trustee has certainly done that both in describing the various roles held by each, detailing timeframes, and identifying amounts received as service provider fees, and quite literally, as has been pointed to a few times today, in Paragraph 340, which we provide a chart that draws out the pathways of transfers from BLMIS and on to each of the defendants -- would you like me to go through each one as represented in the chart, okay -- Each of the defendants that were made by Luxalpha and Groupement.

And it's correct, as the defendants have pointed out, that the allegations in this complaint are different from some of the cases that have been recently before Your Honor to require subsequent transfers from Fairfield Sentry. And there's a reason for that. In those cases, the trustee received records from Fairfield Sentry's administrator, Citco, which are the books and records of Fairfield Sentry and which reflect the payments into and out of Fairfield Sentry.

We don't have that here. We don't have a production of all of the books and records of Luxalpha and Groupement. And yes, the trustee has received some productions. And in those, there were audited financial statements, invoices, and fee agreements. And it's from those documents that the trustee was able to make the allegations he did concerning the subsequent transfers. But those documents don't provide the details and they don't provide the complete picture.

And as Your Honor has recently noted in the decision in Picard v. Mayer, the trustee has made his allegations here as an outsider to these transactions. And in some cases, these transactions are several layers deep. And as Your Honor also recently held in Picard v. First Gulf -- and I'll quote from the decision, "In order to determine how Fairfield Sentry spent the billions of dollars it received from BLMIS, this court would need to review financial documents in order to trace the monies to all of Fairfield Sentry's principals, insiders, creditors, and customers. Undoubtedly, the court will trace and calculate how Fairfield Sentry spent its BLMIS funds at a later stage of litigation. At this stage, the trustee need only assert allegations that make it seem plausible that defendant received BLMIS monies." And these are the very circumstances that we have here with Luxalpha and

Groupement.

It is not a case, like the defendants argue in Picard v. Shapiro. In that case, there were allegations where the trustee made on information and believe that the BLMIS accounts were funded by subsequent transfers without more. And there, the court found that the trustee didn't give enough information to make the plausible inference that these funds were BLMIS customer property. But that's not the case here, where the trustee has alleged the involvement of all of the service providers in Luxalpha and Groupement and that all of the service providers were paid fees as service providers of Luxalpha and Groupement. And as we've previously noted, Luxalpha and Groupement's assets were invested with BLMIS. It was their only business and thus the plausible inference can be made that these subsequent transfers were BLMIS customer property.

And I know we got in earlier to the specific allegations about UBS AG, and I pointed Your Honor to those particular allegations. And I believe in response, Mr. King said that this may not even amount to the Rule 8 pleading standard. And that's not the case. And we look to Picard v. Chase. And in that case, the court found that the trustee's complaint met the Rule 8 standard by adequately apprising the defendants there of the subsequent transfers at issue where the complaint set out the initial transfers

in Exhibit B to the complaint and then alleged, and this is a quote, that "some or all of these transfers were subsequently transferred to defendant Chase and/or other defendants in the form of commissions or fees, transfers from one account to another, or another means." And that was sufficient to apprise the defendants.

And as Your Honor -- and Your Honor cited to Picard v. Chase in Picard v. Mayer. And there was a similar set of circumstances where there were various levels of transfers. And there Your Honor pointed to the quote from Picard v. Chase where the moving defendants are a group of interrelated individuals and entities and whether they additionally received subsequent transfers of BLMIS funds from one another is a question to which they and they alone have the requisite information to respond.

And we have not received -- we do not have yet the documents that we would need to identify these specific subsequent transfers. We do not have the books and records from Luxalpha or Groupement or from the Access entities. We don't have bank statements from the defendants. And these are the documents that would assist the trustee and the Court with figuring out how Luxalpha and Groupement paid their agents and service providers.

And unless Your Honor has any questions, I have nothing further.

THE COURT: Thank you. Mr. King, I see that you are off mute, so do you want to rebut?

MR. KING: Yeah. The hour is late and I will be short, Your Honor. Because --

THE COURT: Where are you? It's still pretty early here.

MR. KING: Fair enough. I'm happy to go on and on, but I don't think the 69 other people on this Zoom would appreciate that. So I will be very quick.

First thing. On the issue of actual knowledge. The one thing you didn't hear Ms. Usitalo speak about was the standard of what one needs to show; a high level of certainty and an absence of substantial doubt. Everything she said about knowing about impossibility of returns and trading outside the daily close and inability to identify counterparties was alleged in the Merkin case and the judge there held that's not good enough. At most it was willful blindness. He did find willful blindness, meaning a strong suspicion but at least some doubt. But he held that did not constitute, even with all inferences in the favor of the plaintiff -- the trustee here, same plaintiff -- an actual knowledge that no securities were being traded.

I urge Your Honor to read the Merkin case, 515 B.R. 117. And you'll see that the allegations --

THE COURT: (indiscernible) I haven't read them

all already

MR. KING: I would urge you to reread the Merkin case, Your Honor. Because the allegations there are equivalent in many respects and go beyond anything that's in the current complaint. And it just doesn't satisfy actual knowledge.

On the subject of the subsequent transfers, I am not demanding dollar-for-dollar tracing. I get that that is an issue for the most part to be decided later. But on the face of the complaint, it is impossible to have made $32 million in subsequent transfers when you've only received $16 million in initial transfers. They know the initial transfers are only $16 million through 2006, and yet they are claiming subsequent transfers through 2006 of $32 million. That's not plausible. That's not possible. Math doesn't allow that to happen. And I have heard no explanation --

THE COURT: Let's just not be there yet, Mr. King. I've heard your argument.

MR. KING: Lastly, I've heard no explanation as to what happened to that subparagraph D of the proposed second amended complaint that was filed five -- longer than that now, 2015, where there was an actual allegation about monies received by UBS AG. It's not in the current complaint. It's gone. And there is an allegation as to every other

defendant. It is not enough just to parrot the language of 550 and say you got something, I am entitled to recover it. You need some factual allegation under the Supreme Court standards. That's all, Your Honor.

THE COURT: Okay. Anyone else wish to be heard?

MR. KNUTS: Your Honor, just briefly on behalf of Mr. Dumbauld.

THE COURT: Sure.

MR. KNUTS: Counsel for the trustee spent part of her time talking about how Mr. Dumbauld acted in good faith and presented information that they are now using to try to hold the Access defendants liable. It seems to me that you cannot hold an employee liable for a return of compensation just by attending a meeting, just by reporting accurately the information that he developed to the people who could make decisions at the company. And to hold otherwise, to say that somehow there's an allegation --

THE COURT: That's called an affirmative defense. Okay.

MR. KNUTS: No, the Geltzer case said it was not -- in this context that it was not an affirmative defense. So I would just ask Your Honor to see whether you agree with that or not. Thank you.

THE COURT: Thank you. Anyone else wish to be heard?

Thank you, everyone. Interesting arguments. Interesting. We will obviously get a written opinion. Or two or three. I don't know how I'll put them together. Okay, everyone. Have a great day. Be safe. Enjoy the weather. Bye.

(Recess)

THE COURT: Apologize, everyone. I went to chambers by basically sounding like I dismissed everyone. And I was reminded that I did not dismiss everyone, that I could go to chambers and talk, but I have other matters on. So I apologize profusely to everyone that I did it in the way that I did it. And chambers told me to leave them alone and come back to you all. So, very good. Give me one moment to get to where I am.

We are at 10-05358, Picard v. Citibank. And that is -- yes, very good.

State your name and affiliation.

MR. CHARLEMAGNE: Good afternoon, Your Honor. Chardaie Charlemagne on behalf of the trustee.

Good afternoon, Your Honor. Carmine Boccuzzi, Cleary Gottlieb on behalf of Citigroup Global Markets Limited, Citibank NA, and Citicorp North America Inc.

THE COURT: Very good. Just give me two minutes, please. Because the last argument I had myself all scattered with that complaint everywhere. So if you would

just be patient with me.

Okay, I am now ready. This is -- Mr. Boccuzzi -- how do you?

MR. BOCCUZZI: Boccuzzi. Boccuzzi, Your Honor.

THE COURT: This is your motion to dismiss.

MR. BOCCUZZI: Yes. Thank you, Your Honor. One thing. The docket number you said at the beginning, I'm not sure --

THE COURT: I said adversary proceeding 10-3545. Is that incorrect?

MR. BOCCUZZI: 10-05345.

THE COURT: Yeah. What happens is I left the zero off. Sometimes people leave the zero off.

MR. BOCCUZZI: Okay. And then I just misheard the numbers. Apologies.

THE COURT: Okay. I apologize. And I am glad you -- I am so glad you clarified it for the record. So this is Adversary Proceeding 10-05345.

MR. BOCCUZZI: Thank you, Your Honor.

THE COURT: Thank you.

MR. BOCCUZZI: This is the motion to dismiss brought by the -- I'll call them the, when I refer to all three of them, the Citi defendants. But the complaint here is really two sets of claims; one by the trustee against Citigroup Global Markets Limited, and I'll try to just refer

to them as Citigroup Global Markets, and the other is a claim against Citibank and Citicorp. And they are both claims under Bankruptcy Code 550 as purported secondary transferees. I think it might make sense just for purposes of dividing it up to start with the claim against Citigroup Global Markets. That claim arises out of two purported secondary transfers totaling $100 million that allegedly went from Madoff to the Fairfield Sentry fund and then on to Citi Group Global Markets. The trustee originally --

THE COURT: Excuse me for interrupting.

MR. BOCCUZZI: Yes.

THE COURT: And that is -- you are saying it was a swap, correct?

MR. BOCCUZZI: Yes, that involved a swap. I was going to give some of that background, Your Honor, just to set the table as it were. And that was exactly my next point. The claim was originally $130 million. That was comprised of three different transfers, one in 2005 and then the ones that we're here about today in 2008. But the district court in 2013 -- and that's at 505 B.R. 135 -- dismissed a $30 million transfer as a result of the application of the 546(g) safe harbor. And that's the safe harbor that protects or covers transfers in connection with a swap agreement. And the swap agreement in this case -- and it's discussed in that opinion -- is one that was

between Citigroup Global Markets and a fund that was named Auriga. And what Auriga wanted via the swap was to have leveraged exposure to the Fairfield fund. So the swap agreement provided that Citigroup Global Markets would pay or take money from Auriga -- from Auriga, yes, based on the performance of the Fairfield Sentry fund. Citigroup itself didn't want to have direct market exposure to the Fairfield fund. That's not the point of these transactions. It wanted to hedge that. So what it did was it bought shares in the corresponding amount of the swap. And so if Auriga wanted a return or money out of its swap, it would notify Citigroup Global Markets. Citigroup Global Markets would redeem the corresponding appropriate amount of shares from the Fairfield fund and pay that over to Auriga. So it was a very mechanical sort of process. Auriga says let's reduce the size of the swap, Citibank does the calculation -- Citigroup Global Markets, excuse me -- and then redeems out. And two such redemptions happened in 2008, and they are the subject of the motion today and the current amended complaint from the trustee. One was in April of 2008 for $60 million and one was in November of 2008 for $40 million.

And our motion as to these claims -- I think I'll just discuss the grounds of that and then we can move on to the Citibank side of the complaint -- says that the complaint as to Citigroup Global Markets should be dismissed

in full. And what we're doing is basing it on the caselaw and the reasoning set out in the concurrent by Judge Menashi in the Citibank decision that went to the Second Circuit where he questioned the underpinnings of the so-called Ponzi scheme presumption --

THE COURT: But you're arguing a concurrence to me, not the majority ruling?

MR. BOCCUZZI: Right. The majority acknowledges that no one was challenging the Ponzi scheme presumption. It didn't bless or accept the Ponzi scheme presumption. And so, yes, it is a concurrence. So the concurrence cites, and we cite in our brief, other cases that point out some of the issues with the Ponzi scheme presumption. And an important one is that there is of course no mention of the Ponzi scheme presumption in the Bankruptcy Code. The Bankruptcy Code trains on in Section 548 as well as the other avoidance provisions the transfer itself; what was the intent? And now we're talking about actual intent to hinder, delay, defraud of the transfer at issue, and it doesn't look to broader issues related to how the debtor was run or managed or if it was a Ponzi scheme. The Bankruptcy Code doesn't give out special rules for fraudulent conveyances in the context of a Ponzi scheme. And here of course we are dealing with primary transfers and alleged primary transfers, because we also raise a tracing point as to the

April 2008 transfer. But allegedly starting with Fairfield -- from Madoff to Fairfield. And of course Fairfield was a net loser. So we're not talking about illegitimate false profits.

Your Honor in the Goodman case earlier this year said of course there's no reason not to apply the Ponzi scheme presumption in the context of a recipient of false profits, fictitious profits. We don't have that here in this case. We're dealing with the return of principal. And so what we have then is at most a preference among creditors as opposed to the squirreling away of assets to get them out of the hands of creditors and keep them under some sort of indirect or other dominion or control of the original debtor.

And so we would say if you then look back to the sort of usual badges of fraud analysis and you look and you see that the transfers to Fairfield did not remain under any sort of control with Madoff, there's no argument given that it was just a return of principal, that there was inadequate consideration. And so you just have a situation where, again, they need to plead actual intent to hinder, delay, defraud as to these transfers. And we just don't think that the usual resort to the Ponzi scheme presumption should do the trick.

And then as to the tracing point, our arguments as

to tracing would not dispose of the entire case against Citigroup Global Markets. Here we are really talking about the $60 million transfer in April of 2008 from Fairfield to Citi Global Markets. But again, if we look at the complaint and we look at things that I believe Your Honor could take judicial notice of, you see that the $60 million that came in April of 2008. There was no recent transfer by Madoff to Fairfield in that amount. You have to go back more than three months to mid-January of 2008. At that time, there is a transfer of $70 million. But in between that transfer and the transfer to Citi from Fairfield, you have at least $141 million in other transfers going out from Fairfield. And we just think given that it's just not plausible to say based on that math that you can say the $60 million -- or there's a plausible case here that the $60 million was in fact money that came from Madoff as opposed to other subscribers into the Fairfield funds.

So those are the two arguments that we think warrant complete or at least partial dismissal of the claim against CGML. And I'm happy either to take any questions, Your Honor, or move on to the Citibank side unless you want to go one at a time and have the trustee respond on Citigroup Global Markets.

THE COURT: Go to the Citibank argument.

MR. BOCCUZZI: Okay. On the Citibank side, what

we are dealing with here is a loan, a loan made in 2005 by Citibank to what became known as the Prime Fund. That was one of several funds managed by the Tremont Group and that invested with Madoff.

In March of 2008, Tremonte and Prime, finding an alternative lender, terminated that loan. So they terminated the loan, and they paid back the $300 million. In the period of the life of the loan, between June or so of 2005 and March 2008, Citibank received regularly scheduled interest payments in the amount of around I think $40 million. And the trustee is seeking to claw back under 550(a) those interest payments as well as the $300 million repayment.

We think that this claim should be dismissed. And as to this -- this is point two in our brief -- we think the Court can dismiss it because the sort of (indiscernible) plus ultra fraudulent conveyance is depletion of the estate. And if you look at what happened here -- and that's both in the complaint that's against us, the incorporated by reference complaint against Tremont, as well as a related complaint involving ABN AMRO is that that repayment to us, again, which was driven by Tremont and not Citi, was part of one integrated transaction where $300 million came out of the Madoff estate, but then a corresponding greater amount went right back into the Madoff estate through another

Tremont-managed fund.

And so our position is that -- and we cite cases to this effect and I would refer Your Honor to the Ivy case involving the entities that were buying steel. When you have one integrated transaction like that where the -- at the end of the day the debtor is left not depleted and in fact having more money than the -- it's really not the proper subject of a fraudulent conveyance/550 claim because you don't have that initial depletion of the estate.

Again, the caselaw that we cite, the Gredd case and other cases focuses on is their harm to the debtor that resulted from the transfer. And given these facts that are in the complaint and are judicially noticeable by Your Honor, we think they're not.

And there's also -- that argument we think should dispose of the entirety of the claim. There's also a tracing argument again as with the portion of the claim against Citigroup Global Markets. And in the context here, we are talking about the attempt to claw back the interest payments that were made to Citibank over the life of the loan.

So, for example, there during the last 12 months of 2005 when the allegation is that Citi received about $4.4 million in interest from the Prime fund, there were no transfers in that period from Madoff to Prime. And again in

2007 when there's about $18 million in interest flowing to Citi, you don't see any initial transfers going on from the debtor to Prime. So we think, again, in the absence of that, there's just no plausible allegation of tracing. And at the very least if Your Honor doesn't dismiss the entire claim, those claims as to interest payments should be dismissed for failure to plausibly allege an initial transfer that passed on to us.

THE COURT: Very good. Ms. Charlemagne?

MS. CHARLEMAGNE: Thanks, Your Honor. Again, Chardaie Charlamagne with Baker Hostetler on behalf of the trustee.

Your Honor, defendants advance three main arguments in their motion to dismiss. First, they argue that the trustee has not alleged that BLMIS made the initial transfers at issue here with the requisite intent to defraud under Section 548(a)(1)(A) because, according to them, the Ponzi scheme presumption should not establish such intent.

Second, they argue that there was no depletion of the estate because someone else later invested other funds in the Ponzi scheme through a separate account.

And third, they argue that some of the subsequent transfers they received did not contain stolen customer property.

These arguments are without merit. The trustee

has alleged that the specific transfers at issue here were made with actual intent to hinder, delay, or defraud as required under Section 548(a)(1)(A) both by way of the Ponzi scheme presumption and through badges of fraud. This and other courts have repeatedly upheld the Ponzi scheme presumption, found the same allegations made here sufficient to satisfy Section 548(a)(1)(A), and repeatedly rejected defendant's precise argument regarding customer property. Defendants cite no binding precedent or authority in support of their suggestion that the Court set aside its rulings in this liquidation or well-established principles of law such as the applicability of the Ponzi scheme presumption to a Section 548(a)(1)(A) claim.

Instead, defendants grasps onto dicta and a concurrence by Judge Menashi in the Citibank appeal arguing without supporting authority that the Ponzi scheme presumption should be set aside. This reliance on Judge Menashi's concurrence is misplaced as I will discuss shortly.

Defendant's argument provide no legal basis upon which this Court may dismiss the trustee's claims based on the facts in this case. I will address each of defendant's argument in turn.

I would like to first take a few moments to talk about why the trustee's allegations satisfies Section

548(a)(1)(A). Section 548(a)(1)(A) allows for the avoidance of transfers made with actual intent to hinder, delay, or defraud creditors. Defendants argue that the trustee has not alleged facts relating to the specific initial transfers he seeks to avoid here. Defendants are wrong.

The trustee has alleged that BLMIS made the specific transfers at issue here to Prime Fund and Sentry with actual intent to hinder, delay, or defraud its creditors. Specifically, the trustee alleges the following facts.

The trustee alleges that BLMIS' IA business operated as a fraud and Ponzi. This is alleged at Paragraphs 15, 62, and 66 of the complaint. The trustee alleges that BLMIS did not purchase or sell securities for its IA business customers. This is alleged at Paragraph 16 of the complaint. Instead, BLMIS created false, backdated trades for its IA business customer accounts beginning in the early 1970s. This is alleged at Paragraph 17 of the complaint. Thus, the IA business had no legitimate business operations and produced no profits or earnings. This is alleged at Paragraphs 62 to 65 of the complaint. And the trustee also alleges that BLMIS comingled all of its customer funds into a single account. This account was used to distribute funds to other customers, to make distributions and payments for other customers, to benefit

Madoff and his family personally, and to prop up Madoff's proprietary trading business. This is alleged at Paragraph 67 of the complaint.

In other words, BLMIS robbed Peter to pay Paul using funds received from one set of customers to pay other customers with no legitimate business operations or trading taking place.

These allegations plausibly establish that BLMIS operated a Ponzi scheme through its IA business. The trustee also alleges facts that plausibly establish that BLMIS made the initial transfers at issue here to Sentry and Prime Fund in furtherance of that Ponzi scheme. Specifically the trustee alleges the following facts.

The trustee alleges that Sentry and Prime Fund were IA business customers who invested substantially all of their assets with BLMIS. This is alleged at Paragraphs 5, 53, 172, and 181 of the complaint. The trustee alleges that BLMIS comingled all funds it received from Prime Fund and Sentry with other customer funds in a single BLMIS account which it used to maintain the Ponzi. The comingled funds were not used to trade securities, but were used to make distributions or payments to other customers. Again, this is alleged at Paragraph 67 of the complaint.

The trustee alleges that the initial transfers at issue here were made by BLMIS to Sentry and Prime Fund as IA

business customers. This is alleged at Paragraphs 3 through 4, 44 through 45, 164, and 177 of the complaint. And the trustee alleges that those transfers to Prime Fund and Sentry were not comprised of proceeds of securities transactions. Rather, the initial transfers to Sentry and Prime Fund which are at issue here were comprised of customer property stolen from other customers. This is alleged at Paragraphs 1, 67, 164, and 177 of the complaint. These allegations are sufficient to state a claim under Section 548(a)(1)(A) with respect to the initial transfers at issue here both by way of the Ponzi scheme presumption and under the badges of fraud test.

I would like to now address Defendant's arguments regarding the Ponzi scheme presumption. This Court and others inside and outside of this district have all held that allegations such as those just mentioned are sufficient to trigger the Ponzi scheme presumption. As an initial matter, defendant's argument that the Ponzi scheme presumption is inconsistent with Section 548(a)(1)(A) is without support or authority. District courts within this circuit have unanimously applied the Ponzi scheme presumption as a matter of law to establish a debtor's fraudulent intent as required under Section 548(a)(1)(A). Every circuit court to consider the issue has similarly applied the Ponzi scheme presumption as a matter of law. In

fact, defendants were unable to cite a single case anywhere in this nation holding that the Ponzi scheme presumption is inconsistent with the plain language of Section 548(a)(1)(A). Instead, defendants base their argument that the Ponzi scheme presumption is overbroad and inconsistent with the text of Section 548(a)(1)(A) on dicta and a concurring opinion. But as the district court recently held, notwithstanding Judge Menashi's concurrence, the Ponzi scheme presumption remains the law of the circuit. This is in Sage Realty at 2022 WL 1125643.

Defendants take issue with the Ponzi scheme presumption as a means of establishing fraudulent intent, arguing that it is overbroad, inconsistent with the plain langue of 548(a)(1)(A), and that the presumption is not in the Bankruptcy Code.

First, the Ponzi scheme presumption is not overbroad. Defendants argue that the presumption is overbroad because it allows the trustee to establish fraudulent intent for any and every transfer BLMIS made. But as just discussed and as set forth in our papers, the Ponzi scheme presumption establishes fraudulent intent for the specific initial transfers at issue here because those transfers were made in furtherance of BLMIS' Ponzi scheme. This is because with a Ponzi scheme, the investor pool is a limited resource that will eventually run dry. And as is

the case with all Ponzi schemes, Madoff, the Ponzi scheme operator, must have known all along from the very nature of his activities that investors at the end of the line would lose their money. Thus, the only possible inference is that the debtor here, Madoff, had the intent to hinder, delay, or defraud future creditors because he must have known that future creditors would not be paid.

Second, defendants argue that the Ponzi scheme presumption is inconsistent with the plain language of Section 548(a)(1)(A) simply because the presumption is not explicitly defined in the Bankruptcy Code.

However, judicially-created presumptions are regularly implemented by trial and appellate courts. Indeed, presumptions typically serve to assist courts in managing circumstances in which direct proof for one reason or another is rendered difficult. And courts regularly accept judicially-crated presumptions arising out of considerations of fairness, public policy, probability, as well as judicial economy.

In Basic, Inc. v. Levinson, 485 U.S. 224, the Supreme Court upheld a judicially-created presumption of reliance based on the fraud on the market theory in a securities case and specifically held that the presumption was supported by common sense and probability.

Thus, in direct contradiction to Defendant's

arguments, the Ponzi scheme presumption is not overbroad, it is not inconsistent with the plain language of Section 548(a)(1)(A). The presumption is well-founded and supported by common sense and probability. Again, the only possible inference here is that Madoff intended to hinder, delay, or defraud future creditors because he must have known that future creditors would not be paid by the very nature of the Ponzi scheme he created. The Ponzi scheme presumption presumes actual intent only where the transfers were made in furtherance of the Ponzi scheme, as is the case with the initial transfers at issue here.

And as just mentioned, the trustee alleges with particularity that Madoff operated a Ponzi and that the initial transfers to Prime Fund and Sentry were made in furtherance of that Ponzi scheme. This is sufficient to allege fraudulent intent under the Ponzi scheme presumption.

Almost all the cases cited by the defendants in support of their argument to sidestep the Ponzi scheme presumption are constructive fraud cases. And in the case of Finn v. Alliance Bank, the court's ruling was based on Minnesota state law which directly contradicts New York law and is not binding in this district. Defendants' reliance on other cases is similarly misplaced. Lustig v. Weiss, (indiscernible), and In re Churchill Mortgage Investment Corp. were cases that focused on whether the presumption

establishes a lack of reasonably equivalent value as an element of a constructive fraudulent conveyance claim. Reasonably equivalent value is not an element of Section 548(a)(1)(A).

Defendants' reliance on Sharpe is also misplaced. The Second Circuit has held Sharpe inapplicable to this civil proceeding. Sharpe involved a loan to the debtor and no Ponzi scheme. And Sharpe actually supports the trustee's position here that the Ponzi scheme presumption is appropriate because, unlike the initial transfer in Sharpe, BLMIS made the initial transfers here in furtherance of its fraud.

Moreover, Sharpe didn't dismiss an actual fraud claim because it would result in an impermissible choice between creditors that should be considered a preference. It dismissed that claim because it found that the initial transfer was not made in furtherance to or in connection with the debtor's fraud.

Even if the court were to find for the first time in this district that the Ponzi scheme presumption is inapplicable to a Section 548(a)(1)(A) claim, contrary to defendant's contentions, the trustee alleges multiple badges of fraud which are sufficient to support a finding of fraudulent intent with respect to the initial transfers at issue here. Specifically the trustee alleges the following.

The trustee alleges that BLMIS' IA business was not legitimate; it was a fraud and a Ponzi scheme. And that is alleged at Paragraphs 15 through 17, 62, and 66.

The trustee alleges that BLMIS concealed facts and made false representations about the IA business. That is alleged at Paragraphs 59 through 60, 64 through 65.

The trustee also alleges that BLMIS comingled all customer funds into a single account. This is alleged at Paragraph 67. And the trustee alleges that BLMIS misused investor funds and created false financial statements. This is alleged at Paragraph 17, 59 through 60, and 64 through 65.

These allegations have already been held to be sufficient to support a badges of fraud theory of fraudulent intent. This can be found in SIPC v. BLMIS, 528 F.Supp.3d 219 (2021). There, the court found that badges of fraud such as those just discussed were sufficient to establish fraudulent intent under a badges of fraud theory.

In conclusion, the trustee adequately alleges fraudulent intent for the specific transfers at issue here under either the Ponzi scheme presumption or a badges of fraud theory.

Next I would like to address defendant's depletion of the estate arguments.

Defendants challenge the trustee's power to avoid

a $301 million transfer from Prime Fund to the defendants. Their reasoning is that they were somehow parties to an integrated transaction that did not deplete the estate. This argument has no legal or factual basis. Before I discuss the lack of any factual basis for defendant's argument, I would like to discuss the fatal flaws in defendant's legal argument.

Even if defendants were able to establish that they reinvested the customer property they received into another feeder fund, which they cannot, their argument would still fail because the bankruptcy court has already rejected defendant's reasoning in Picard v. Lustig at 568 B.R. 481. This is not the first time this argument is before the court. This is not even the first time this argument is before the court in this very case.

Although the bankruptcy court did not decide this issue the last time defendants raised it, at the hearing on a previous motion, the bankruptcy court questioned why defendant's depletion of the estate argument was not foreclosed by the bankruptcy court's decision in Picard v. Lustig. Defendants were unable to distinguish Lustig then as can be seen in the hearing transcript, and they are not able to distinguish is not, nor do they try to in their motion papers.

Defendants did not even attempt to rebut the

trustee's opposition brief concerning Lustig, and the Lustig defendants were actually better situated to make this argument because, unlike Citibank, the Lustig defendants actually reinvested funds back into the BLMIS estate via a different customer account. The Lustig defendants withdrew fictitious profits from one BLMIS customer account and later reinvested those funds into another BLMIS account through a feeder fund.

In Lustig, the court declined to offset fictitious profits in one BLMIS account against losses in a separate BLMIS account, reasoning that the reinvestment is still a separate transaction governed by whatever account agreements the funds had with BLMIS.

This is the same situation here. Defendants are trying to offset the transfers they received from Prime Fund, a net winner, against Broad Market, a net loser. Moreover, if the court found in Lustig that the same party who took its money out and reinvested it back into Madoff was unable to offset these transfers against each other, why would Citibank be allowed to get a credit for another party's investment? They should not.

Citibank and Citicorp are attempting to collapse transactions across accounts and co-op this value. The deposits that Citibank is attempting to co-op for themselves have already been applied to the deposits in the Broad

Market account.

Additionally, as noted in Lustig, Defendants' proposition flies in the face of established Second Circuit law on net equity in this case. In the Second Circuit's decision upholding the trustee's net investment method of determining net equity, the court held that each customer's net equity should be calculated by crediting the amount of cash deposited by the customer into his or her BLMIS account less any amounts withdrawn from it.

Here, the deposits and withdrawals in Broad Market's account form the basis of this account's net equity just as the deposits and withdrawals in Prime Fund's BLMIS account form the basis of this account's net equity. By trying to combine transfers in unrelated transactions, Defendants are requesting a second round of credits for the deposits in Broad Market's account. This result would be inequitable to all BLMIS customers, but --

THE COURT: Ms. Charlemagne, I'm sorry to interrupt you, but I've got to interrupt you. Because I don't remember this issue being addressed, and you said it was. In Lustig?

MS. CHARLEMAGNE: It wasn't -- yes, in Lustig the issue, the rationale was addressed in Lustig. So in Lustig, they were also trying to do a similar thing. They were trying to offset fictitious profits in one BLMIS account

against losses in a separate --

THE COURT: But did you have another case rather than Lustig?

MS. CHARLEMAGNE: No. Lustig was the only one I referenced. I did reference that the Defendants had made this very argument in this case before and even --

THE COURT: Okay. I did hear that, but somehow I thought I was missing a cite.

MS. CHARLEMAGNE: No.

THE COURT: I heard Lustig and I heard maybe argument before. Okay. Thank you. You clarified my brain. Okay.

MS. CHARLEMAGNE: All right. So I am going back to talking about the defendants and the net equity decision.

THE COURT: Okay.

MS. CHARLEMAGNE: So here the deposits and withdrawals in Broad Market's account form the basis of this account's net equity just as the deposits in Prime Funds form the basis of that account's net equity. By trying to combine the transfers, the defendants are requesting a second round of credits. And this would be inequitable to all BLMIS customers.

Defendants also entirely missed the point the trustee makes about how the net equity calculations affected the Tremont settlement agreement. The trustee is not

arguing that Citibank is bound by the settlement. Rather, the settlement accurately reflects the facts of the deposits that defendants are now attempting to co-op for themselves.

Having discussed the legal deficiencies of defendants arguments, I will now address why defendants' argument has no factual basis.

Defendants are wrong on the law, but they are also wrong on the facts. Defendants' arguments depends on this Court exercising its equitable powers to collapse multiple, unrelated transactions to find that there was an integrated round trip transaction. There is no basis for this argument. No funds went out and came back in from Citibank or Prime Fund. They only came out.

As set forth in Exhibit E to the amended complaint at ECF 214, Prime Fund did not return any of the $475 million it withdrew from its BLMIS IA account on March 25th, 2008. In fact, Prime Fund did not make any deposits to its BLMIS IA account after receiving the initial transfers that Defendants' claim did not deplete the estate.

The facts make it clear that the $301 million received by defendants from Prime Fund is an interest of the debtor and property that the trustee is permitted to avoid and recover.

As background, the trustee's claims against defendants arise from the receipt of subsequent transfers of

stolen customer property from Prime Fund, which held Account Number 1C1260 at BLMIS. The facts of this transaction are simple; defendants received $301 million from Prime Fund. This $301 million transfer from Prime Fund to Citibank and Citicorp never returned to BLMIS or the BLMIS estate. Had Prime Fund not received the initial transfer of $475 million from BLMIS, it would have become part of the customer property fund available to distribute pro rata to all customers. This fact alone is sufficient to defeat defendants depletion of the estate argument.

Indeed, in Bear Stearns v. Gredd, 275 B.R. 190, a case heavily relied upon by the defendants, the court concluded that Section 548(a)(1)(A) only permits at trustee to avoid a transfer of an interest of the debtor and property when but for the transfer such property interest would have been available to at least one of the debtor's creditors. This is precisely the case here. But for the $475 million initial transfer from BLMIS to Prime Fund, $475 million, including the $301 million subsequently transferred to defendants from Prime Fund would have been available to at least one of BLMIS' creditors.

This brings me to the next fundamental point regarding defendants' depletion argument. Section 548(a)(1)(A) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in

property that was made or incurred within one year before the date of filing if the debtor made such a transfer with actual intent to hinder, delay, or defraud.

Diminution or depletion of the estate arguments are typically concerned with how one defines an interest of the debtor. In other words, the issue discussed in Bear Stearns was whether an interest of the debtor in property referred only to property that would have been available for the benefit of the debtor's creditors and/or property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.

In Bear Stearns, the transfers sought by the trustee were held to not be an interest of the debtor in property because a federal law made it so that those funds were never part of and could never be a part of the estate. And thus, those funds were never available to satisfy any obligations of the debtor.

Here, defendants cannot and do not argue that the transfer at issue was not in interest of the debtor in property because there is no question that the $301 million they received would have been available for the benefit of the debtor's creditors and was property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceeding. This fact alone

defeats defendant's depletion of the estate argument.

Additionally, the district court has already held in Bear Stearns that depletion of the estate is not an element of a Section 548(a)(1)(A) claim. It found that defendants can raise this issue as an affirmative defense and set forth three elements that defendants must plead and prove to establish the defense. Defendants cannot, nor do they even try to establish any of these elements. Rather, rather than helping defendants, Bear Stearns further bolsters the trustee's argument that these transfers to Citibank and Citicorp depleted the estate.

The Southern District in Bear Stearns set forth a three-element affirmative defense that the transferee bears the burden of pleading and proving to establish that a transfer did not deplete the estate. Specifically, the transferee must prove that the transfer did not reduce the (indiscernible) that would have been available to the creditors. It didn't hinder, delay, or defraud any creditors, and it did not have any other adverse impact on any creditor or creditors generally.

The Bear Stearns court noted that if the transferee succeeds in successfully making this affirmative defense, the burden then shifts to the trustee to rebut the transferee's showing. Whether the transferee has sustained his ultimate burden of proof will be decided on the entire

record before the court. Defendant does not address the elements laid out by Bear Stearns, much less demonstrate that they have established on the face of the complaint as would be required to prevail on an affirmative defense on a motion to dismiss.

The Bear Stearns court explained that creditors --

THE COURT: Ms. Charlemagne, do you have all of this in your arguments already, or are you just reading what you gave me?

MS. CHARLEMAGNE: I do have a lot of it already in my argument. I can streamline it a bit.

THE COURT: Thank you. I would prefer for everybody, if you've said it once, you don't need to say it twice. But if you want to add, I'd like for you to add. Not just give me what you've already given me.

MS. CHARLEMAGNE: Okay. I think most of these arguments are in our papers.

THE COURT: They're mostly in your papers. And I let you go on for a long time.

MS. CHARLEMAGNE: You did. And I appreciate that. Okay. So I think what I'll do is I'll just quickly distinguish Pereira, which is a case that they strongly rely on for their depletion arguments. And then for the customer property argument that they make, I will very briefly touch on that and rest on our papers.

THE COURT: Thank you.

MS. CHARLEMAGNE: And so for Pereira, I just wanted to clarify that in Pereira, Pereira was in a completely different procedural and factual posture than this case here. It was a full record at summary judgement and the defendants have not shown a single case successfully applying this collapsing doctrine to defeat a Section 548(a)(1)(A) claim.

In Pereira, the agreements cross-referenced each other. Both agreements were expressly conditioned on the contemporaneous closing of the other transaction and payment on both agreements was accomplished with a single wire transfer.

Here, the defendants did not even explain which agreements formed the supposedly integrated transactions. They attempt to utilize an unrelated party's subsequent transfer which held a wholly different BLMIS account as a reason by BLMIS' transfers to Prime Fund did not deplete the estate.

So defendants asked this Court to collapse unrelated transactions between separate parties and to ignore economic realities of fraudulent transfers in a plea for equitable relief that has no basis in law or fact.

And for the customer property, I don't have anything new to say. So, Your Honor, I will just rest on

our papers for the argument there.

THE COURT: Thank you very much. Any quick rebuttal, Mr. Boccuzzi?

MR. BOCCUZZI: Yes, if I might, Your Honor. Just three points.

THE COURT: You know, I don't mind any points. Just don't repeat what you've given me.

MR. BOCCUZZI: I'm not going to repeat. I'll just -- it will be a true reply in terms of points raised by Ms. Charlemagne.

Number one, on the Ponzi scheme presumption, the red flags analysis that we heard from Your Honor was nothing more than the allegations as to why Madoff was a Ponzi scheme. We are not, as in many of the cases that the trustee cites, saying that the Ponzi scheme presumption shouldn't apply because there was no Ponzi scheme. We agree there was a Ponzi scheme. What we're saying is that accepting that there was a Ponzi Scheme shouldn't change the rules of the game. And you still have to go transfer-by-transfer. And we cite cases about the Ponzi scheme transaction.

Going to these points on Page 15 of our opening brief and also in the In re Churchill case there is the quote, "The fact that the debtor's enterprise as a totality is operated at a loss or in a manner that is fraudulent does

not render actually or constructively fraudulent a particular transaction which in and of itself is not fraudulent in any respect." And we would say the return of principal is that.

And then quickly on Lustig. On Lustig, the argument is really based on what the trustee did vis-à-vis certain customers as part of a settlement to which we were not a party. So that's not binding on us. And importantly, I think the analysis is exactly backwards. I don't think we're arguing anything that would disrupt the net equity rule. There's really two sides to the coin here. What is what is the estate comprised of and what can the estate pull back. And number two with the net equity, how do you divide that up among customers, of which we are not, which also distinguishes from the Lustig case.

And so we are saying here if you look at the pie that was the debtors estate as it were and you look at these transactions, there was no depletion of the estate given that when the money came out, it went back in and then some back into the estate. And so without that depletion, you don't have a 548 claim.

THE COURT: Anything else either one of you wish to add?

MS. CHARLEMAGNE: Nothing else from the trustee, Your Honor.

THE COURT: Very good. You will receive a written opinion.

The Court needs to take about a five-minute break.

(Recess)

THE COURT: Very good. We are back on the record. If you would just give me a moment.

And now we are at 11-02572, Picard v. Korea Exchange Bank. State your name and affiliation.

MR. CIRILLO: Good afternoon, Your Honor. Richard Cirillo. I guess the affiliation is Cirillo Law Office. And I am appearing for the defendant, Korea Exchange Bank.

MR. FISH: Good afternoon, Your Honor. This is Eric Fish at Baker Hostetler on behalf of the Trustee.

THE COURT: Very good. Excuse me, let me get my -- oh, that's the next one. Here we go. I have it now. And it's your -- Mr. Cirillo, I believe you are the one on the motion to dismiss.

MR. CIRILLO: I do indeed. And I appreciate Your Honor's patience in waiting so long to get to my case.

THE COURT: Well, you notice I got a little impatient just a minute ago when they were repeating what they had already given me.

MR. CIRILLO: Well, on one occasion Your Honor said that you were prepared to sit all day and therefore had

brought snacks. I hope you had brought snacks today.

THE COURT: I did. I did. I did.

MR. CIRILLO: Okay. Well, I will proceed, Your Honor, if I may.

THE COURT: Please.

MR. CIRILLO: Korea Exchange Bank is a Korean bank, and it was trustee, as alleged in the complaint, of two Korean investment trusts. The complaint does not allege that KEB -- and I'll call Korea Exchange Bank KEB -- does not allege it conducted any activities in the United States in connection with Fairfield's shares.

I would like to cover three topics. One is customer property, the second is the Fairfield complaint, and the third is personal jurisdiction. And we'll be happy to rest on the papers for our 546(e) position.

I have read carefully all the Court's decisions in other subsequent transfer cases, and I am arguing this motion because I believe the KEB complaint and the arguments we are proposing to Your Honor are different from what has been presented before. And those different arguments are what I believe deserve dismissal of the KEB complaint in all or in part either with prejudice or with leave to amend.

The first issue I would like to address is the failure of the KEB complaint to allege that KEB received any customer property. I think it's unquestioned that an

essential element of the Plaintiff's claim is that the defendant actually did receive customer property. If the plaintiff does not allege that factually and plausibly the complaint fails.

This complaint alleges in Exhibit B that -- and I know everyone else is calling it BLMIS. I've always for 14 years called it BLMIS. And with Your Honor's permission I would like to not have to retract my mind. So absent objection, I will call it BLMIS here.

THE COURT: Mr. Fish, do you object?

MR. FISH: I have no objection as long as I can call it BLMIS as I have been doing for the past 13 years or so.

THE COURT: Okay.

MR. CIRILLO: Okay. Well, I have a year on you, so I appreciate your concession.

THE COURT: Okay. Mr. Cirillo.

MR. CIRILLO: Yes. The complaint alleges --

THE COURT: Just so you know, for the transcriber of this, would you please just say BLMIS when you're doing it? I mean not you, the transcriber. I'm giving that message to the person transcribing this. Okay.

MR. CIRILLO: Good, good.

The complaint alleges in Exhibit B that BLMIS transferred $3 billion to Fairfield Sentry. In Exhibit C --

and it alleges that in Exhibits C or CD and so forth to the subsequent transfer complaints before Your Honor, they alleged collectively that Fairfield transferred out $5 billion. The complaint does not in fact say that Fairfield had no source of money other than BLMIS. And obviously if it paid out $2 billion more than it got from BLMIS, it did have another substantial source of money.

The exhibits in the subsequent transfer cases except other than this one against KEB are before the court and part of this case, and they need to be considered in evaluating whether this complaint alleges the receipt of customer property.

The first reason is, as the Court correctly held, all the subsequent transfer actions are part of the same case. In doing so, the Court cited Judge Fitzsimmons' decision in In re In re Geiger, 446 B.R. 670 (Bankr. E.D. Pa. 2010).

The second reason they are before the Court and in this case are that the exhibits in each of the subsequent transfer complaints are judicial admissions in the same case and are binding on the plaintiff. The plaintiff cannot escape or disavow those admissions. And for that, I would cite Guadagno v. Wallack Ader Levithan Associates, 950 F. Supp. 1258 (S.D.N.Y. 1997), which in turn cites a Seventh Circuit decision.

The third reason is that the court may take judicial notice of those exhibits in the other subsequent transfer cases and what the plaintiff says in those exhibits. The plaintiff admitted that judicial reference may be taken of other complaints in the case in his arguments about incorporating the Fairfield insider complaint.

Therefore, the plaintiff has alleged that Fairfield paid out money that did not come from BLMIS and therefore is not customer property. Someone got that $2 billion. The complaint only said, in a conclusory, non-factual, conjectural sense, that a portion of the redemptions to KEB were customer property. That allegation is non-factual, it is not made on personal knowledge, and is not entitled to credit.

The complaint also doesn't allege that the redemptions did not or could not have come entirely from the $2 billion. He has not alleged, therefore, that it is more than a possibility that KEB receive customer property from the $3 billion of BLMIS transfers.

But he also admits in the allegations I've referred to that it is equally possible that none of KEB's $33 million of redemptions came from the $3 million, but instead came from the $2 billion.

So because he hasn't pled that, h e has to rely on

an inference in order to --

THE COURT: Wait. Explain the $2 billion to me again. What does that --

MR. CIRILLO: I'm sorry, say that again?

THE COURT: What is that $2 billion you just talked about?

MR. CIRILLO: Yes. If you add up all of the exhibits in all of the subsequent transfer complaints that are before Your Honor that allege subsequent transfers to subsequent transferees, they don't add up to $3 billion; they add up to $5 billion. And so the difference of what Fairfield paid to the subsequent transferees is obviously not customer property of BLMIS; it has to have come from someplace else.

Up to this point, the argument has been made that each complaint is different and the court judges on a 12(b)(6) motion judges what is in the four corners of the complaint. But because they are allegations and judicial admissions in the same case and the Court can also take judicial notice of what they say, that is why we are entitled to argue that the Plaintiff has failed to tie the $33 million of Fairfield's transfers to KEB to the $3 billion rather than the $2 billion. And that because he hasn't pleaded them other than in the conclusory statement that a portion of them did, which has no factual support

whatsoever in the complaint, and that is required, he needs an inference to tie the $33 million to the $3 billion. And the inference is exactly what the Supreme Court's decisions in the Twombly and Iqbal cases address. That's exactly the issue of what permits an inference. And the court says simply that the presentation of two equal possibilities does not suffice to permit an inference. And that is what we have here; the possibility that the KEB transfers may have come from the $3 billion and the possibility that they may have come from the $2 billion. If they come from the $3 billion, there is a possible liability. If they come from the $2 billion, there's no possible liability and the complaint has to push that over the line from possible to plausible.

Again, to emphasize how closely Twombly and Iqbal dictate the result, Twombly was a Sherman Act Section 1 case which require the plaintiffs as an essential element to allege that the defendants acted at a competitive contract combination or conspiracy, or to put it another way, they acted in concerted action.

The complaint alleged factually that the defendants reacted to the plaintiff's market conduct, finding it to be a competitive threat. The facts also allege that the defendants all reacted in an identical or very similar way to that. The plaintiff asked the court to

draw an inference that this uniform behavior was sufficient to allege the essential element of a concerted action.

The court, however, pointed out that the same fact that the defendants -- the same facts supported that the defendants' identical behavior was not a result of concerted action, but instead the independent business decisions of each of the defendants, not a conspiratorial one, but each one deciding to respond to the competitive threat in the same way.

And so as in our case, the alleged facts presented two equal possibilities, and the court said that isn't sufficient and it dismissed the complaint. That's where the Twombly phrase that we so often hear, "Nudging from what is possible or conceivable, but what is plausible" comes about.

The court held very clearly that an inference to survive a 12(b)(6) motion must be reasonable, and must be based on facts alleged in the complaint. It said that if it didn't, the allegation did not show entitlement to relief as both 12(b)(6) and Rule 882 require.

Iqbal, two years later, held that Twombly applies to all civil cases, including bankruptcy cases, by citing Federal Rule of Civil Procedure 1. And so in Iqbal, the plaintiff had brought a Bivens constitutional discrimination claim alleging that he was remanded to especially harsh jail confinement because he practiced Islam and because he was a

national of a Middle Eastern country. He claimed that he was partially confined for religion and nationality. And that in fact was possible on the factual allegations of the complaint.

But the court pointed out that the government had shown that Mr. Iqbal was confined or alleged that Mr. Iqbal was confined in strict conditions because he was or he may have been a combatant against the United States following the September 11th catastrophe.

The court found that without factual allegations, those two possibilities were equal and that without more factual content, as the court called it, the complaint failed to nudge the claim over the line from possible or conceivable to plausible.

So these require two things. The Supreme Court decisions require factual allegations to satisfy Rule 8(a)(2) and they require a factual basis underlying a reasonable inference to satisfy 12(b)(6) if an inference is needed to allege an indispensable element of a claim. There are many cases that decisions that apply Twombly and Iqbal as indeed they must because it is our controlling precedent.

Coming back to why it's relevant here. The plaintiff alleges and admits that Fairfield made $5 billion of transfers to subsequent transferees, but sent only $3 billion to its -- but BLMIS sent only $3 billion to

Fairfield.

That is -- it is possible that the $3 billion was the source of all or a portion of the KEB subsequent transfers, but it is equally possible that the $2 billion was the source. This, because it leaves two equal possibilities that have no factual content to nudge them across the line, requires dismissal.

Now, to tie up a few loose ends, this pleading failure is not cured by the relevant pathways approach. The relevant pathways cases require a showing through which -- a showing by which the funds were transferred from BLMIS to in this case KEB. And that's in the Picard v. Charles Ellerin Revocable Trust case, WL 892514 *3 (Bankr. S.D.N.Y. March 14, 2012).

THE COURT: Let me ask you what you're adding to your papers, Mr. Cirillo. Please add to them.

MR. CIRILLO: Well, Your Honor, the papers come in in a sequence, and I am trying to tie them together in a way that makes sense and also to address some issues that may arise because there are prior decisions in subsequent transferee cases that make statements such as that the relevant pathways approaches is appropriate. And I am saying that in this case at least, that there is no showing of a relevant pathway because it doesn't show that the $33 million came from the $3 billion.

Also, the vital statistics approach doesn't apply because that requires the who, when, and how much. But in this case, who sent the subsequent transfers and how much of them purportedly came from BLMIS are not alleged, whereas in other cases using those approaches there's always something more, like ledger entries approximate in time or identical in amount. I won't cite the cases because the citations are in the brief.

This is also not a complicated exercise --

THE COURT: This is not your personal jurisdiction. This is general.

MR. CIRILLO: No.

THE COURT: Okay.

MR. CIRILLO: This is the customer property issue.

THE COURT: Okay. All right.

MR. CIRILLO: I'm almost to the end of it. I just want to also, because of comments in other decisions, say that this is not an exercise that complicated matching of dates and amounts that you have seen. It only takes the factual allegations the plaintiff has made in his exhibits and adds them up arithmetically.

Therefore, lacking the critical element of customer property, I believe the complaint should be dismissed under Rules 8(a)(2) and 12(b)(6).

Quickly on the incorporation of the Fairfield

affiliates and insider complaint.

THE COURT: Let me just ask you a question though. And I do want to ask this question. I think what you just told me on that customer property argument, that sounded like trial to me. It doesn't sound like a motion to dismiss. So can you link that to a motion to dismiss for me, please?

MR. CIRILLO: Yes. Because the complaint does not allege an indispensable element of the cause of action, which is an allegation, a factual --

THE COURT: So you're saying that every one of these cases I should have dismissed, because everybody makes that same argument. But you said no, no, you're different. And how are you different?

MR. CIRILLO: Your Honor, I understand that Your Honor has made that ruling in other cases.

THE COURT: Many times.

MR. CIRILLO: And it that the facts in the complaint against KEB are different, firstly. And second, I do believe that Your Honor was wrong in all those cases. But that's not my --

THE COURT: But how? But how?

MR. CIRILLO: Because Your Honor may not have evaluated the absence of any factual allegation that ties the payments to the $3 billion of BLMIS money rather than to

the equally-alleged, admitted -- judicially admitted $2 billion that Fairfield paid out that didn't come from BLMIS. That's $2 billion of non-customer property being paid out. There is $3 billion paid --

THE COURT: But Mr. Cirillo, Fairfield didn't have any other money.

MR. CIRILLO: That's not true, Your Honor. There is no allegation to that effect, firstly. At least in the KEB complaint. And secondly --

THE COURT: (indiscernible).

MR. CIRILLO: -- the plaintiff's own exhibits prove that it had $2 billion of resources other than from BLMIS. I have not put in this because it is a pleading motion, and it does show that there is the absence, the lack of an indispensable element of the claim, but I haven't put in the fact that there are allegations and concessions that Fairfield was paying subsequent transfers out of newly-received subscription money rather than passing it to BLMIS and then having BLMIS pass it back to Fairfield for Fairfield to pass back. That money would not be as an example that -- the plaintiff does not negate in the pleadings in any fashion -- as an example of non-customer property that is equally possible to have been the source of the KEB payments.

That is why under the Supreme Court decisions it

is crystal clear that the plaintiff has made no factual allegations and in fact the only allegation is a bare bones conclusory statement that a portion of the payments to KEB came from BLMIS. That is not acceptable under any 12(b)(6) or 8(a)(2) pleadings standard. And that is why, Your Honor, I don't carry the water for any other defendant. And regrettably, I didn't get to argue as the first case, but I don't believe that KEB should be disadvantaged because I am briefing and arguing at this point rather than in the beginning of the sequence. And I believe these arguments are soundly supported by a controlling precedent, and therefore they should be considered very carefully and I believe accepted.

So may I continue to the incorporation briefly?

THE COURT: Please.

MR. CIRILLO: Okay. The court has held that the Fairfield insider complaint may properly be incorporated into the subsequent transfer complaints under Rule 10(c).

Forgive me for drinking, but I don't want to lose my voice.

And the Court cited In re In re Geiger, 446 B.R. 670 (Bankr. E.D. Pa. 2010) for that point. And indeed, that's what Judge Fitzsimon did in that case. But then immediately in the next sentence after doing so, allowing the incorporation, she then dismissed the complaint under

Rule 8(a)(2) because the incorporation caused the complaint not to be a short and plain statement.

KEB also based its motion on both Rules 10(c) and 8(a)(2). And so while the incorporation may be permissible, the short and plain statement is not accomplished, and therefore the case is dismissible for that separate reason. Courts have reached exactly the same position allowing incorporation under 10(c) and then dismissing because the incorporation made the complaint not a short and plain statement. One case, Davis v. Bifani, 2007 U.S. Dist. LEXIS 3800, and American Casein Company v. Geiger (In re Geiger) 446 B.R. 670 (E.D. Pa. 2010). I am not certain I have that court and date right, but I know it's the right case. It's cited correctly in the brief.

What am I asking for relief? Certainly I am not asking the Court to order the Plaintiff to type all of the allegations of the Fairfield complaint into the KEB complaint. That wouldn't accomplish anything. I certainly see that. But what the plaintiff does know, and only the plaintiff knows, is and can quickly, inexpensively, and without delaying the case put those paragraph numbers -- and if less than a full paragraph, the sentence into a list and we can put the list in the stipulated order. That is more efficient than a Rule 12(f) motion to strike the immaterial parts of the KEB complaint that are incorporated into it.

And I have to say that despite KEB's and my involvement in the Madoff cases for -- well, 14 years and KEB 11 years, I don't know and KEB doesn't know what the plaintiff has in mind. He has alleged hundreds of paragraphs of allegations. He has attached dozens of exhibits, none of which are directed at KEB. The KEB complaint is the blueprint for this case if it goes forward. And KEB and I are really entitled to know under Rule 8(a)(2) a short, plain statement of what it is we are defending. And we don't know that at this point.

If Your Honor permits, I will move to the personal jurisdiction points, which --

THE COURT: Please.

MR. CIRILLO: -- are also important and also should result in a dismissal of the complaint, whereas obviously the incorporation point does not seek a dismissal; it seeks less relief of having them give me a list. All right.

Personal jurisdiction. All of the plaintiff's allegations against -- involving KEB and personal jurisdiction are in paragraphs 5 and 6 of the complaint. Nine of the allegations in those paragraphs are purely conclusory, conjectural, and statements of law, and the law clearly bars them from consideration.

For the Court's convenience -- and I put the exact

language of the allegation and the specific reason it cannot be considered on this motion as an appropriate probative allegation of jurisdiction in a chart at Pages 8 and 9 of KEB's reply memorandum, which is ECF Docket 143 filed on August 15 of this year.

Iqbal and Twombly that I have already discussed say the factual matter is required to survive Rule 8012 motions, and it also says that a non-factual allegation, a conjectural, speculative, conclusory legal opinion type of allegation is not entitled to a presumption of truth. That's very important because we hear all the time that the plaintiffs are entitled to a presumption of the truths of their allegations. But as the Supreme Court said many times in those opinions, only if they are factual.

And the second thing is that they have to be factual or they may not serve as a basis for a reasonable inference of something else. And that again is in those cases. And I would also cite In re Lyondell Chemical Company, 543 B.R. 400, 411 (Bankr. S.D.N.Y. 2016), and DirecTV Latin America, LLC v. Park 610, LLC, 691 F.Supp. 2d 405 (S.D.N.Y. 2010).

I am not going to discuss those conclusory allegations further. There are four assertions on which the plaintiff rests personal jurisdiction that are fact-based but that do not result in any or all of their cases,

individually or collectively, in jurisdiction.

First I will note that the plaintiff argued that factual allegations aren't necessary on a motion to dismiss for lack of jurisdiction. And that's just directly contrary to what Twombly and Iqbal say. Iqbal in fact said the pleadings that are no more than conclusions are not entitled to assumption of truth. Well-pleaded allegations are allowed the presumption of veracity and they are what are necessary in determining if they plausibly rise to an entitlement to relief. And in this case, plausible arise the inference is what one makes of these four allegations in terms of the personal jurisdiction contention; do they allow an inference of jurisdiction?

In fact, the Supreme Court expressly rejected the assertion that no facts are required in a footnote in which it dismissed the defense's actual statement of that position. It gave a long discussion of it. But it said in summary Rule 8(a) contemplates the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader's bare (indiscernible) that he wants relief and is entitled to it.

And that was also the holding in a case Your Honor cited in many of the prior opinions, Dorchester Financial Securities Ind v. Banco BRJ SA, which is a Second Circuit 2013 decision at 722 F.3d at pages 84-85 where the court

says, "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading good faith," and this is key, "legally sufficient allegations of jurisdiction," and that a 12(b)(2) motion "assumes the truth of the plaintiff's factual allegations for purposes of the motion and challenges their sufficiency."

So if there aren't factual allegations, and in this case the plaintiff is looking for an inference, there aren't factual allegations, there's no inference and no factual allegations.

All right. Let me also before hitting the four points put on the table exactly what minimum contact test is. We all know that it's purposeful availment. But what Hanson said is more than that. Chief Justice Warren said it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state. Thus -- from those activities conducted within the forum state, thus invoking the benefits and protections of its law. And that's cited to Justice Stone's opinion in International Shoe, which is by contrast on the facts one in which there were sufficient context with Florida -- I'm sorry, sufficient context, whereas in Hanson there were not.

The first of the four allegations that have some

factual foundation is that KEB received and read Fairfield's 2004 private placement memorandum. As Your Honor knows, there was a whole series of Fairfield private placement memoranda and they didn't all say the same thing. In fact, after the SEC got on Madoff's tail and made him register as an investment advisor in 2006, there was a lot more in his private placement memorandums than there had been before.

And that's important because the plaintiff puts the 2004 memorandum before the court as Exhibit 1 to Mr. Fish's declaration. And what we find is that the exhibit itself, which necessarily overrides the complaint's mischaracterizations, shows that KEB could not have learned from that document that BLMIS was managing Fairfield's assets in New York and it could not have learned that Fairfield's redemption payments came from BLMIS to the extent they want -- well, came from BLMIS, period.

These are not only not stated in the one thing that's factually alleged, the PPM, and it is therefore not inferable from the PPM that KEB knew that the money it was sending and the money it was receiving to and from Fairfield was actually going to BLMIS and coming from BLMIS.

In fact, the only reference to BLMIS in the 2004 PPM is that BLMIS was a sub-custodian of Fairfield asset, sub-custodian to Citco. It is a commonly-known industry term that shows a sub-custodian is an entity that holds on

to assets, but not an entity that invests or manages funds for another.

In fact, the 2014 PPM says 17 times that the split strike conversion strategy was being -- or that a company in Bermuda with a Bermuda address was Fairfield's investment manager and that it was overseeing Fairfield's strategy of investment called the split strike conversion strategy.

The plaintiff points out that the PPM explains that the split strike conversion strategy involved trading by Fairfield in U.S. securities. That's true, but it's irrelevant under both Hanson v. Denckla and Walden V. Fiore, which is at 571 U.S. 277, because there's no allegation that KEB performed any of that trading. And as the cases hold, personal jurisdiction over a foreign defendant depends on that foreign defendant's activity, not on the activity of third parties. That is a position the Supreme Court has stated both for commercial cases, as in Hanson, which actually addressed the point, and also in Walden for tort cases.

Therefore, while I do recognize that Judge Lifland's 2012 BLI decision embraced a view that knowledge by a defendant about what a third party would or wouldn't do, or would or might do sufficed for jurisdiction, that decision is in direct conflict with the Supreme Court's prior decision in Hanson and also was effectively overruled

by the Supreme Court's subsequent decision in 2014 by Walden where the court said the relationship must arise out of contacts that the defendant himself creates with the forum state. Due process limits on the adjudicative authority principally protect the liberty of the non-resident defendant, not the convenient of plaintiffs or third parties. We have consistently rejected attempts to satisfy the defendant-focused minimum contacts inquiry by demonstrating contacts between the plaintiff or third parties and the forum state. For that, the court cited Hanson and three other Supreme Court cases.

Therefore, the argument -- and I know it's a very initially attractive idea that tossing a seed and growing an orchard may have been what some defendants did, not KEB. But throwing -- knowing only and nothing more than that Fairfield was executing its split strike conversion strategy itself, or even if it knew it was by BLMIS, which it didn't, is not a basis to support jurisdiction over KEB.

Moving on. The second of the allegations that had some foundation in fact -- in the allegations is that the New York forum and New York governing law clauses and the subscription agreements between KEB and Fairfield is itself a relevant contact. That's not true.

If you can hear the dogs in the background, Your Honor, I have to admit, I got a memorandum saying this is

Bring your Dogs to Work Day. And so they are expressing their views of my argument.

THE COURT: Good or bad?

MR. CIRILLO: I'll have to consult with them later. But ultimately only your view counts. All right.

Why are the forum and governing law clauses not contacts with New York? Let's look at the forum provision.

The forum provision is not an exclusive jurisdiction provision. All it says is that Fairfield may drag KEB into New York court. It does not say that KEB can't sue in another court. It does not say that Fairfield Sentry can't sue in another court. And of course they are both foreign entities and other courts are available. In fact, Fairfield Sentry, Your Honor knows from the Migani case, did sue subsequent transferees in BVI and did not insist that that case proceed here.

So if anybody got the benefit or privilege of New York forum, it was not KEB; it was Fairfield. It did not reflect any conducting of activity by KEB in New York. If KEB had sued in New York, that would have been a contact. But it didn't. And so that is not a sufficient basis. The forum clause is not a sufficient basis to say that it was a contact by KEB in New York by which it was invoking benefits or privileges of New York.

The governing law provision is also not a relevant

contact. A governing law provision in a contract is only a rule for its interpretation and enforcement. It does not -- citing it does not avail the person of a privilege or benefit of conducting an activity in New York. That's what Hanson Denckla, all the other cases require. The citing of a governing law provision is a frame of reference for litigation for the parties to negotiate and for arbitrators to interpret the contract.

New York does not -- it makes New York law, it doesn't own it. It's not something that it can prevent somebody from citing. And citing it does not subject someone to the jurisdiction of the court, of a New York court simply because it wants to refer to that as the frame of reference. It's not a privilege of conducting activities in New York. Any decisions that say or imply otherwise either are based on different facts than those are alleged or they fail to apply the controlling Supreme Court law and are therefore not viable precedents.

The third contact is that KEB filed proofs of claim in the BLMIS bankruptcy. And that's true. But in this case, it does not provide a basis for personal jurisdiction. When KEB filed those claims, the court did indeed have personal jurisdiction over KEB to adjudicate its claims against the -- KEB's claims against the BLMIS estate. However, several years before the plaintiff filed this

adversary proceeding, the plaintiff rejected KEB's claims in the bankruptcy. At that point, the court's jurisdiction over KEB based on the proofs of claims ended. The Court had no longer a basis for jurisdiction. And the filing of the adversary proceeding did not revive it.

The rationale for the rule that filing proofs of claim subjects the filer to the court's jurisdiction in an adversary proceeding is based specifically on the desire to have both the claims and the adversary proceeding resolved in a single case before a single judge. It is a judicial convenience rule, and that allows the court to net the outcomes of both parties prevail. However, that rationale does not and cannot apply if the bankruptcy claim was rejected before the adversary claim is filed. And as is known, the presence or absence of jurisdiction is determined at the moment the adversary proceeding is filed. And so at the time that this case against KEB was filed, there was not any proof of claim proceeding, proof of claim on file having already been rejected.

I did not find a case on all fours, but I did find relevant precedent, and that is cited and discussed and quoted at some length in the briefs and in the memoranda. Those cases look at the very analogous point of whether the filing of a proof of claim or the unfiling of a proof of claim permits the defendant in an adversary proceeding to

have a jury trial of the adversary claim or does not permit that. And it's based on whether equity jurisdiction exists in the court because of the filing of the proof of claim in the bk proceeding. And those cases are explored in great depth in the original brief we filed, which is Docket 138, filed on May 16th of this year, and Docket 145, filed on August 15.

They hold that a jury trial right under equity jurisdiction in an adversary proceeding is defeated by the pendency of a bankruptcy court filing, citing the conservation of resources theory. But they also say that if the claim is properly withdrawn or was concluded, the former claimant regarding his right or its right to the jury trial in the adversary proceeding because the court's equity jurisdiction had ended. And that's the situation that applies here in the related context, what I believe is a related context.

Therefore, the former proofs of claim filed by KEB are also not relevant contacts and do not confer a basis for jurisdiction under the minimum contact test.

The fourth and final factually-asserted alleged contact is that KEB made and received share payments through New York bank accounts. And I underscore the word through rather than to because the allegation acknowledges that the money was actually transferred, as the subscription

agreement signed by Fairfield and KEB provide, was actually transferred from KEB's account in Korea and to Fairfield's account with Citco in Ireland and then in revers, from Ireland to Korea. Those are the accounts designated in the subscription agreements.

Personal jurisdiction, as I believe Your Honor has said in some of the decisions, is determined by the law of New York. That's what the Second Circuit said in the Licci v. Lebanese Canadian Bank SAL, 732 F.3d 161 (2d Cir. 2013). And indeed, in that case the Second Circuit questions the New York Court of appeals in order to find out, ask it to explain what the law of New York is on this point of when bank accounts, use of bank accounts confer jurisdiction or a contact for conferring jurisdiction over a foreign plaintiff.

Because New York law governs, the New York Court of Appeals decisions are definitive. They can't be ignored or overridden by any other court. And there are three specific cases that define the law in this area. Amigo v. Marine Midland, 39 N.Y.2d 391, Licci v. Lebanese Canadian Bank, 20 N.Y.3d 327 (2012), and Rushaid v. Pictet, 28 N.Y.3d 316 (2016). Another case cited, a recent appellate division case, First Department cited in the briefs confirmed that these three cases remain the law of New York.

So what do they hold? They hold that a non New

York person's use of a New York account is not a relevant contact for jurisdiction unless two conditions are met. One condition is that the account -- the use of the account must because integral to carrying out an illegal scheme.

The second condition is that the foreign user of the account must have been an active participant in the illegal scheme. Neither is alleged against KEB. And in fact, there is not even an allegation that KEB was aware of the Ponzi scheme, and it wasn't. All right.

In Licci, the illegal scheme was the financing of international terrorism. In Rushaid it was an international bribery and money laundering scheme. In both cases, the defendant, the foreign defendant resisting jurisdiction was an active participant, and in both cases the defendant resisting jurisdiction was using it as an integral part to carrying out the terrorism or bribery and money laundering schemes.

The New York Court of Appeals recognizes that trillions of dollars of ordinary commercial transactions, innocent transactions pass through New York banks every day on their way between foreign banks. The New York Court of Appeals indicated no intention -- it did not indicate any intention that its decisions would apply to ordinary commercial transactions which would or at least could have a serious chilling effect on that commerce if international

parties were routinely exposed to personal jurisdiction in New York, a place that many non-Americans would rather not litigate.

Amigo, the first of the three cases -- and that is the undergirding for the Licci and Rushaid cases, said the use of a New York bank for international transactions could not by itself constitute a relevant jurisdictional contact. Licci and Rushaid, which came later, made an exception for use of an account to accomplish wrongdoing.

The plaintiff argues in his opposition memorandum that, well, BLMIS' Ponzi scheme was illegal and therefore he has alleged facts bringing the case within the New York exception. That -- it is true that BLMIS' Ponzi scheme was illegal, but it does not confer jurisdiction over KEB. KEB is not alleged to have known of the Ponzi scheme, certainly not alleged to have been an active participant in the Ponzi scheme.

Furthermore, even assuming BLMIS and Fairfield were wrongdoers and their use of the New York banks was integral to their scheme, what they do cannot be attributed or imputed to KEB because of the decisions of the Supreme Court in Hanson and Walden. Only KEB's activities are relevant to the minimum contacts analysis.

Therefore, KEB's innocent use of New York banks in ordinary commercial payments flowing between an Irish and a

Korean bank is not relevant to jurisdiction over KEB as a matter of New York law established by New York courts. If other course have reached a different decision, it is of no moment because only New York's court of appeals can determine what New York's law is, and we know exactly what its law is from the Amigo Farms, Licci, and Rushaid cases.

Finally, I acknowledge the totality of the circumstances test for personal jurisdiction. However, parsing this between the generalized conclusory allegations, the nine allegations in Pages 8 and 9 of the reply brief and parsing these four contacts, not one of them is sufficient as a contact, a relevant contact for jurisdiction. And therefore, they can't add up to a totality of minimum contacts. Adding a bunch of zeroes still leaves you with a zero.

Even if the Court were inclined to find one of them or two of them sufficient, the cases defining what the totality of circumstances test is made it clear that it is a robust evaluation of whether in their totality there is a showing of doing business that takes advantage or privileges of New York. And those are not the case here.

And for that as my final citation, I will point the Court to the Hill decision, Hill v. HSBC Bank PLC, 207 F.Supp. 3d 333 (S.D.N.Y. 2016), which was distinguished but not rejected in the BNP decision that's often mentioned

which says defendant's principal contrary authority, Hill v. HSBC Bank, et cetera, is distinguishable, and then goes on to distinguish that the BNC facts were strongly in favor of jurisdiction, but the acuity of facts in Hill were not.

The plaintiff says that, well, BNC said the Hill decision isn't relevant because it deals with Tremont. That's just not the case. It is relevant because of what the district court held and the BNC court did not in any fashion undermine the decision in Hill.

If I didn't cite BNP, it's SIPC v. Bernard L. Madoff Investment Securities LLC, 594 B.R. 167 (Bankr. S.D.N.Y. 2018)

With that, I will end. Appreciate Your Honor's great patience and hoping that I have persuaded you and the two dogs and ask Your Honor to dismiss this action against KEB under Rules 12(b)(6) and 8(a)(2).

THE COURT: Very good. Mr. Fish?

MR. FISH: Thank you, Your Honor. I will touch briefly on the customer property and Fairfield complaint incorporation by reference issues first.

As articulate as Mr. Cirillo was in making both of those arguments, they are really the same ones that have been made in all of the past subsequent transfer actions that have filed motions to dismiss, and they're the same arguments that have been rejected.

So for the customer property issue, the trustee has alleged the relevant pathways, including the transfers from BLMIS to Fairfield Sentry, and then the transfers from Fairfield Sentry to KEB. The Exhibit B to the complaint includes all of the transfers from BLMIS to Fairfield Sentry. And Exhibit C includes all 22 transfers from Fairfield Sentry to KEB. That's all that the trustee needs to do at this point. The trustee has alleged the relevant pathways, including identifying each transfer by date and amount from Fairfield Sentry. And as I said, includes all of the transfers from BLMIS to -- I'm sorry, from Fairfield Sentry to KEB.

And on their face, the subsequent transfers at issued looked to be transfers of customer property, as they all took place after Fairfield Sentry's receipt of initial transfers. And I'll just read one quote from your prior -- Your Honor's prior decision --

THE COURT: Before you go there, give me a second to articulate a question.

MR. FISH: Sure.

THE COURT: Because if this is what I've heard -- these transfers aren't to KEB; they're combined, correct?

MR. FISH: Well, Your Honor, Exhibit B --

THE COURT: You have 20 transfers and these are in Exhibit C. And is that all to KEB?

MR. FISH: Those are all to KEB, Your Honor. And in fact --

THE COURT: Explain it then to me.

MR. FISH: Okay. So Defendants in the case -- there was a defendant who has been since dismissed. It was Korea Investment Trust Company. And Mr. Cirillo made an argument in his briefing that it's not clear who received the transfers because there were two separate defendants. But there's really only one defendant left since the dismissal of the management company. And it's clear -- an din fact, Mr. Cirillo didn't even argue that his clients, KEB, did not receive the transfers, because they did. All of the transfers --

THE COURT: So what you're saying is it was a management company that got dismissed.

MR. FISH: Correct. And they were dismissed because they didn't receive any transfers, or at least that under further investigation we didn't see any. They all went to Korean Exchange Bank.

THE COURT: Okay.

MR. FISH: So -- and I think Mr. Cirillo would acknowledge that his client received all the transfers. And so the argument really is that -- you know, he's making the same argument that every other defendant has made, that the trustee hasn't tied the transfers, the subsequent transfers

to the initial transfers. But I'll just -- in Multi Strategy and Banque Syz Your Honor wrote, "The calculation of Fairfield Sentry's customer property and what funds it used to make redemption payments are issues of fact better resolved at a later stage of litigation."

And I'll just leave the customer property issue with that and I will move on to incorporation by reference unless you have any additional questions.

THE COURT: How much did KEB get?

MR. FISH: Every transfer on Exhibit C -- and in fact, you know, we could delete defendants on that exhibit and just say KEB. They got all of those transfers, $33 million.

THE COURT: All right. Go ahead.

MR. FISH: Sure. So the arguments regarding the improper incorporation by reference of the Fairfield Complaint, Rule Eight's requirement of a short and plain statement have been repeatedly rejected by this Court. And for good reason. Because, number one, the district court has already found in consolidated proceedings that adopting the initial transfer complaint by reference is sufficient. This is the same action as the Fairfield action for purposes of the bankruptcy court. And there's no concern with confusing or inconvenient results, and there's no prejudice to KEB. I mean, what the trustee is really doing in that

one paragraph is alleging the avoidability of the initial transfers. And as I mentioned, this is the same issue that Your Honor has ruled on in probably a dozen cases thus far, and this case is no different.

So unless Your Honor has questions, I will move on to personal jurisdiction.

THE COURT: Please, move on.

MR. FISH: Thank you. So the totality of the circumstances here shows that jurisdiction is more than appropriate. All of Mr. Cirillo's arguments, all of KEB's arguments regarding the lack of jurisdiction, which are done very piecemeal, are abutted by the trustee's allegations and the arguments in the trustee's opposition.

First, KEB individually and as trustee purposely availed itself of the privilege of conducting activities in the U.S. and New York specifically. The trustee alleges that KEB invested in Fairfield Sentry to gain access to BLMIS, which is a plausible allegation when taken together with the allegation that 95 percent of Fairfield Sentry's assets were invested with BLMIS.

Now, Mr. Cirillo gave us a good recitation of Twombly and Iqbal and the standard of plausibility, but the allegation in the complaint in Paragraph 5, that defendants knowingly directed funds to be invested with New York-based BLMIS through Fairfield Sentry, that's a factual assertion

based on the allegation in Paragraph 2 that Fairfield Sentry was a BLMIS feeder fund and had virtually all of its assets invested in BLMIS.

It's therefore a reasonable inference to allege that the purpose of investing in Fairfield Sentry was to gain access to BLMIS. It begs the question why else would you invest in Fairfield Sentry if not to get to Madoff? There wouldn't be any other reason.

And in fact, the Second Circuit has even opined in the In re Picard case in 2019 when these investors chose to buy into feeder funds that placed all or substantially all of their assets with Madoff securities, they knew where their money was going. And Your Honor has also ruled in past subsequent transfer cases that this allegation is sufficient.

So the other issues that Mr. Cirillo has raised, I will go through them in order as well. He raised the issue of the 2004 private placement memorandum and why that private placement memorandum doesn't disclose that Madoff was the manager of the fund. And KEB focuses its papers on references to BLMIS and Madoff in the PPM, but the PPM does disclose that BLMIS holds 95 percent of the funds. And it also discusses the split strike strategy. And there's numerous references in that PPM, even if you didn't know it was Madoff, which is not -- that's not plausible in itself.

But even if you didn't, there's all sorts of references to New York. The strategy was centered around U.S. securities and buying S&P 100 stocks. Everything was in dollars, the minimum investment and the initial offering price. Fairfield Sentry maintained United States counsel. The PPM discussed trading risks discussed in U.S. government activities. It discussed Fairfield Sentry -- or I'm sorry, Fairfield Greenwich Group, which was essentially the manager of the fund, with its principal offices in New York. It discussed Fairfield Sentry's intermediary bank in New York, and it has a mention that legal matters in connection with the offering have been passed upon for Fairfield Sentry in the United States by counsel located in New York.

So the 2004 PPM, Mr. Cirillo tries to make a distinction with the 2006 PPM. But even if you didn't know that Madoff was running the show, you still had all sorts of disclosures here.

THE COURT: Let me interrupt you a minute. You're talking about that. Now, where is that located? What page is that on?

MR. FISH: Sure, Your Honor. The 95 percent of the assets under custody being held by BLMIS, that's attached to my declaration as Exhibit 1. And that's on Page 15 of the private placement memorandum.

THE COURT: Okay. All right.

MR. FISH: Okay. The strategy discussing the S&P 100 stocks and the split strike strategy, that's on Page 8. And I think there may be some on Page 9. The minimum investment and initial offering prices in U.S. dollars, that's on Pages 1 and 10, I believe. Let's see. The U.S. counsel, located in New York, it's located on VI. The trading risks discussing the U.S. government activities, that's on Page 16. The intermediary bank that's in the United States, that's on Page 13. Fairfield Greenwich Group FGG, maintaining its principal office in New York, that's on Page 6. And the legal matters in connection with the offering that had been passed upon in the United States by counsel located in New York, that's on Page 22.

THE COURT: Okay.

MR. FISH: So I think there are a number of disclosures. And again, why else would anyone invest in Fairfield Sentry other than to invest with Madoff if it's 95 percent invested with Madoff? So the trustee's allegations are more than plausible under any standard.

And next I will move to the customer claims that Mr. Cirillo mentioned. But the trustee is not arguing that the customer claims automatically confer personal jurisdiction, but they do add to the totality of the circumstances here, and they show that the investment with Fairfield Sentry was a New York-based investment. And I

believe the customer claim that Mr. Cirillo submits with his declaration even says they are submitting a customer claim as an indirect investor with BLMIS. And also KEB's reasoning that even though they sought a benefit in the bankruptcy court in this jurisdiction by filing a customer claim, but there's no personal jurisdiction. It just seems like a -- contrary. So, again, the trustee is not alleging that these customer claims automatedly confer jurisdiction, but they are a piece of the puzzle.

And next I will move to the subscription agreements. And once again, the forum selection clause is one more circumstance showing the New York-centric nature of the investment, that KEB consented to being sued in New York and the application of New York law. And like the customer claimed, we're not arguing that this provision is binding or automatically confers jurisdiction. Rather, it's one more contact that shows that under the totality of the circumstances --

THE COURT: What exhibit is that? Tell me what exhibit that is.

MR. FISH: I'm sorry. The subscription agreements. They are attached to Mr. Cirillo's declaration as part of their customer claims. And the subscription agreement -- there's three of them, I believe. And the subscription agreement, there's three of them, I believe,

and the first one starts on -- they're all together, so I'll give you the ECF page number, if that's helpful to you. The first one is on Page 10 of 48 of, I believe it's Exhibit A. Let's see, the second one -- and all of these, I think Mr. Cirillo will agree that these subscription agreements are -- say the same thing. The second one is on Page 32 of 48. This is -- and I'll give you -- the Document Number is 137-1. It's Exhibit A to Mr. Cirillo's declaration. And then, the third customer subscription agreement is Page -- I believe is 137-2, Exhibit B to the declaration. On Page 16 of 40 is where it starts.

And I can -- you know, I can give you the specific pages of the -- well I can say that -- I can tell you that the forum clause, the consent to New York jurisdiction is on Page -- is Paragraph -- I believe it's Paragraph 19 of the subscription agreements.

THE COURT: Okay.

MR. FISH: So, we're not alleging that -- or we're not -- we're not arguing that the -- that these subscription agreements, that the forum selection clause automatically confer jurisdiction. But again, it's a piece of the puzzle, and it shows that Korea Exchange Bank had multiple contacts with the forum and purposely availed itself of the benefits and the privileges of doing business in the United States, specifically in New York.

And, you know, these subscription agreements also include the New York bank accounts as well. Where to send -- and in fact, this is where to send the redemptions. And we know that they did receive the redemptions. And so, on Pages -- Page 31 of 48 on Document 137-1, that's Exhibit A, and then there's another one on Page 19 -- I'm sorry, 20 of 48 on Exhibit A. And then, Exhibit B, Document 137-2, there's another one. It's less easy to read, but it does say Deutsche Bank Trust Americas New York on all of them. This is Page 26 of 40 on 137-2. All of these subscription agreements include a New York bank to receive redemptions.

Now, this document doesn't say that this is a passthrough. It says that's where the redemptions are to be sent. And that leads me to the bank account issue, that KEB maintained a bank account in New York at Deutsche Bank Americas, and that's where they received all of the transfers, I believe.

THE COURT: Do you happen to have the last four numbers on that account, by any chance?

MR. FISH: Let's see, it's --

THE COURT: Not all of it. I purposely don't want all of them.

MR. FISH: Yeah, 1033 I think is the account number.

THE COURT: The last four digits?

MR. FISH: Right.

THE COURT: Okay.

MR. FISH: And let me -- I just want to make sure that it's the same account. That's at least what it says on the -- on the subscription agreement. And I've also, Your Honor, I've attached to my declaration some documents as Exhibit 2 and 3, showing the requests for redemption. And they are to go to the same Deutsche Bank Trust Company Americas account. And I believe we've redacted the account information from those.

THE COURT: Okay. Make sure you do. All right.

MR. FISH: But the documents do include -- so, it's clear that KEB requested redemptions and received redemptions in a New York bank account. And this shows -- these documents show that the use of this account was voluntary and there was an intent to use this account for redemptions. So, that's just to say that the transfers were -- they purposely went through the New York bank account.

This is not a situation, as my able adversary has argued, where the -- these bank accounts had nothing to do with the transactions. In fact, I mean, the Trustee is alleging that the transfers at issue in this case, the very transfers, the very subsequent transfers that the Trustee is trying to recover, went through these New York bank accounts. This isn't like some of the cases that Mr.

Cirillo pointed to, where a defendant was accused of wrongdoing or terrorism, but this is a case where the correspondent account was used for the purpose, really, of which the Trustee is suing.

And there's also a case on point, or more on point than the cases KEB cites, that I just want to bring to Your Honor's attention. We cite it in our opposition brief, but it was just decided on May 22, and that's in the Arcapita case. And the District Court in that case affirmed personal jurisdiction where the defendant in the commercial transaction "designated a correspondent account in New York to receive the fund transfers." And even though the debtor chose to use US dollars to effectuate the investment, the Court said that the defendant "could have avoided the United States entirely by routing placements through correspondent accounts anywhere in the world." And this is Bahrain Islamic Bank versus Arcapita Bank. It's 640 B.R. 604.

And similarly, KEB voluntarily used the Deutsche Bank New York account to do business with Fairfield Sentry, which by the way also used a New York account, which is disclosed in the private placement memorandum. And nothing was forcing KEB to do business with Fairfield Sentry. Nothing was forcing them to use a New York bank account. They voluntarily entered into these subscription agreements and took these transfers and used a New York bank account to

do it. So, even though KEB says that they weren't doing anything illegal or they may not have known of the fraud, these correspondent accounts were part of the scheme, and they received subsequent transfers of customer property.

So the -- Your Honor, the totality of the circumstances shows that KEB purposely availed itself of the privilege of conducting activities in the US, and New York specifically. Second, the Trustee's claims arise out of or relate to KEB's conduct in the forum. I don't think that's a dispute. And third, jurisdiction is reasonable under the circumstances, for the same reasons Your Honor has articulated in other subsequent transfer motions that have come before you. And the arguments that KEB makes in its motion are similar to ones that have been rejected in more than a dozen other motions so far. There's no reason to stray from these prior decisions, either factually or legally, and KEB's arguments should similarly be rejected.

Thank you. Unless you have any questions, I'll rest, Your Honor.

THE COURT: I think I had a few. Mr. Cirillo, any --

MR. CIRILLO: Well, yes, Your Honor, I do have a couple --

THE COURT: Bullet-point rebuttals, please.

MR. CIRILLO: I'm sorry, say again?

THE COURT: Bullet-point rebuttals, please.

MR. CIRILLO: Yes, of course. The purposely availed point that my -- that Mr. Fish raised, that goes to the issue that you have to know that BLMIS was behind Fairfield, and there's no basis for that allegation -- for that assertion, other than Mr. Fish's statement that why else would one invest in Fairfield, except to get to Plaintiffs.

Mr. Fish ranged far from the allegations in the complaint, and I will only add this, that as Mr. Fish knows, we have explained to him that KEB was only a -- only executed the transactions that the manager, now dismissed, ordered. It had no obligation to know anything at all about the investments, this or any of the other investments, as Trustee. So, it is pure conclusory speculation, contrary to fact, that KEB knew. And if it didn't know, and there's no allegation other than conclusory allegation that it did, the knowledge is not sufficient. As I explained, my view is that the BLI decision, whatever was in 2012, was effectively overruled in 2014.

Mr. Fish refers to us knowing that KEB knew that -- from the PPM that BLMIS held 95 percent of the funds. As I explained, being a custodian and holding funds -- which many, many broker dealers do for other broker dealers, and we know that Madoff or BLMIS was a registered

broker dealer -- has nothing at all to do with whether it knew that 95 percent of the funds were being invested in BLMIS on a long-term basis. It only tells them -- and certainly does not tell them what Mr. Fish wants to draw from it that KEB knew that BLMIS was behind Fairfield Sentry. There is no imputation.

All of the many things that Mr. Fish listed as New York-centric events can't be imputed to KEB under Walden. It is not part of the totality of circumstances; it is irrelevant. The fact that these accounts were passthroughs in fact is alleged in Paragraph 5 of the complaint, which as I said earlier, talks about -- it says wired funds to Fairfield Sentry through a bank in New York and received funds through its own bank account in New York. Going back to the basic documents that Mr. Fish has identified, Your Honor, the subscription agreements, that's how you get money from the account, the specified account in Korea to the specified account in Ireland, and get it from the specified account in Ireland to the specified account in New York. Innocent, completely commercial transactions, which the three New York Court of Appeals decisions clearly state will not support jurisdiction if they are not by a participant in an illegal scheme.

The reference to things that the customer claims filed KEB say, like being an indirect investor in BLMIS,

can't be things that they -- well, they are not things -- and there's no allegation they are things that BLMIS knew -- that KEB knew when it was investing and redeeming. In fact, those customer claims were filed long after, months after the world knew. From December 8, 2008, onward, we all learned that BLMIS was behind Fairfield. We didn't know it until then, but in trying to participate as an indirect investor, that it learned it was an indirect investor on behalf of its trusts. Of course it alleged what it would need. That doesn't have any evidentiary probity.

The broader issue is that you can't take a bunch of zeroes and add up to more. There is no puzzle to be pieced together. These are not pieces. And the principal argument that I heard several times is that these arguments have already been made and rejected. Your Honor, and I discussed that at one point during my presentation, my argument, and yes, I recognize that there have been decisions that have made and -- on some of these arguments that have been rejected. However, we have seen over and over again that courts can change their minds, and do change their minds. And we know that no progress is made in the law unless it is viewed from new perspectives.

The perspectives that I have presented to Your Honor are not perspectives that have been presented previously. I have been assiduous in keeping track of the

filings and the arguments, and I think that whether or not a prior decision has been made, it needs to be reviewed on the facts of this complaint, on the cases that are cited in these briefs, and on the actual content of the documents that have been put before the Court in this and other cases that are part of the same case.

That's what I have to say, and I thank you for listening.

THE COURT: Very good, Mr. Cirillo. Mr. Fish, do you have anything you wish to add?

MR. FISH: Your Honor, I'll just add a few things here. It wasn't just me who said, why else would anyone invest in Fairfield Sentry, if not for BLMIS, but the Second Circuit said that in the in re: Picard case, 917 F.3d 85, on Page 105 of that opinion. As I said, when these investors chose to buy into feeder funds that placed all, or substantially all, of their assets with Madoff Securities, they knew where their money was going.

THE COURT: Okay. We've heard you.

MR. FISH: And Mr. Cirillo makes a -- made a comment about KEB maybe not necessarily knowing about Madoff and that they were getting instructions. But that's, you know, that's an issue for discovery, because you know, KEB was investing on behalf of trusts. And under New York law, the trustee can't sue the trusts, they can only sue the

trustee. That's why they sued KEB individually and as the trustee of these three trusts.

And the subscription agreements specifically state that if the subscriber is signing as a trustee or agent or nominee or someone else, it still "agrees that the representations and agreements herein are made by a subscriber with respect to itself and the beneficial shareholder." And that's the subscription agreements at Paragraph 27. And KEB is very careful about not saying what the intent of the trusts were, and we can only surmise as to why.

THE COURT: Very good. We're not surmising today.

MR. FISH: Right. But I think it's -- the Trustee has alleged sufficient facts to confer personal jurisdiction in this court.

And also, I also wanted to just go back to something that Mr. Cirillo mentioned about the Trustee not needing to allege facts. That's not what we argued in our opposition. In fact, we were citing a couple of Your Honor's opinions in Bank Lombard Odier and Banca Carige, where I think the quote was, "At the pre-discovery stage, the allegations need not be factually supported." In other words, this is not a summary judgment motion. This is a motion to dismiss, and the Trustee has alleged sufficient facts, both under Rule 12(b)(2) and 12(b)(6).

And with that, Your Honor, I'll rest.

THE COURT: Thank you.

MR. CIRILLO: Your Honor, two words, or two briefly --

THE COURT: You had your rebuttal, so quick. That was his --

MR. CIRILLO: Well, I'm the movant, so he had his -- this is our answer. First, Your Honor didn't misunderstand Dorchester. Dorchester says you need facts and factual allegations. It's the fact allegations that are missing here, and that's what Dorchester said, and that's what Your Honor cited in the part that Mr. Fish just quoted.

Secondly, why else would they invest? Well, the Second Circuit didn't purport to know why KEB acted, and Mr. Fish doesn't know why KEB acted. I mentioned the fact it was a Trustee taking orders simply because he had continually referenced the "why else would they invest"? There are lots of reasons why these trusts would be there, and the Court can't speculate about --

THE COURT: You've both been heard. You have both been heard.

MR. CIRILLO: Good. I'm done; thank you.

THE COURT: 11-02573, Trustee Picard versus Sumitomo Trust and Banking Company, state your name and affiliation.

MR. LANDSMAN: Good afternoon, Your Honor. My name is Zeb Landsman, and I represent Sumitomo, and I'm with the law firm of Becker, Glynn, Muffly, Chassin & Hosinski.

MR. SONG: And good afternoon, Your Honor, Brian Song, Baker Hostetler, on behalf of the Trustee.

THE COURT: Very good. I believe this is your motion to dismiss, Mr. Landsman.

MR. LANDSMAN: It is. Thank you, Your Honor. I am going to be quick, less than 10 minutes, hopefully five, if I can.

THE COURT: You're very kind to a judge that's been sitting all day.

MR. LANDSMAN: You're welcome. I'm going to limit my argument to just one of the points that I raised in the motion, and that's Sumitomo's 8(a) argument.

Rule 8(a) is simple. It requires plaintiffs to include a short, plain statement showing that the pleader is entitled to relief. Here, in this case, the Trustee needs to allege two things: one, that there was an initial transfer from BLMIS to Sentry that is avoidable, and two, that the Sentry -- that Sentry subsequently transferred those funds to Sumitomo.

The Trustee certainly gave us fair notice of the second drop. He clearly identified the subsequent transfer. In Paragraph 40 in Exhibit D, he clearly alleges, simply and

precisely, that $54,253,642 was transferred on October 16, 2007, from Sentry to Sumitomo. He did that perfectly. The problem, Your Honor, is with the first prong.

Rather than identifying an initial transfer that is avoidable, he simply attached a 77-page list of thousands of transfers, totaling billions of dollars, spanning years. That's his Exhibit C, and if you look on Page 6 of our brief, I have a sample of that. It's as if a plaintiff, Your Honor, brought a breach of contract claim and alleged that the defendant failed to perform on a particular day. But then, rather than identifying the contract that was breached, he listed hundreds of contracts and simply said, you breached one of those. Figure it out. Or, if I were accused of running a red light on a particular day that's identified, and then the complaint listed every intersection in the city, I wouldn't be able to answer the complaint. I wouldn't be able to prepare for trial.

In the red light example, I'd have to take discovery on every traffic signal, seek thousands of records from the cameras, seek out potential witnesses to prove the plaintiff may have stated a claim, but it's also made it impossible to prepare for trial. Sumitomo is in that position. The Trustee will have to prove that there is an initial transfer that is avoidable. We have the right to seek discovery about that initial transfer to determine

whether it really happened. He's given maybe documents, but we get discovery on whether it really happened and whether it is avoidable.

We have the right to craft a defense based on which initial transfer the Trustee plans to use at trial, and it's not too soon to require the Trustee to identify one. We need to answer the complaint and start discovery now. We need to gather evidence about the alleged initial transfer now. But we can't.

Without more specifics from the Trustee, we'll have to seek discovery about those hundreds of transactions listed in Exhibit C. We'll have to show up at trial without knowing which transaction constituted the alleged initial one. We'll have to wait for trial for him to tell us whether the initial transfer was within the two-year lookback period or not. We don't know. And that's because our subsequent transfer was within the two-year lookback period, but he hasn't told us if the initial transfer was, and that will affect our defense.

And it's particularly unfair here to keep Sumitomo in the dark, because Sumitomo was a stranger to that initial transfer. It has no direct knowledge of it. Unlike the Chase case that they mentioned, all of that information is with the Trustee and the records he has. We don't know anything about the initial transfers because we weren't a

party. It was between BLMIS, in whose shoes the Trustee stands, and Sentry. And the Trustee has had access to that information for years, yet he still refuses to identify the basis for his claim that there was an initial transfer that's avoidable.

The Trustee needs to comply with Rule 8(a), and Sumitomo cannot answer the complaint or prepare for trial unless he does. And that's why we respectfully request that you dismiss the complaint and perhaps give him leave to amend it, but dismiss the (indiscernible) so we can properly answer it.

THE COURT: Thank you, Mr. Landsman. Mr. Song?

MR. SONG: Thank you, Your Honor. I will address it briefly as well, as it has been a long day for all of us.

The Defendant's argument here is based on the faulty premise that the Trustee is required, here at the pleading stage, to identify and specify the exact initial transfer to Fairfield Sentry, from which the subsequent transfer to Sumitomo flowed. Defendant would thus create some entirely new pleading burden, wherein the Trustee would be required to essentially do a dollar-for-dollar tracing analysis at the outset of the case.

This Court has already held that to plead a subsequent transfer claim, the Trustee must allege facts that support an inference that the funds at issue originated

with the Debtor, which we have done that. No tracing analysis is required, and the pleading burden is not so onerous as to require a dollar-for-dollar accounting of the exact funds at issue. That's because money is fungible, Your Honor, and as, you know, Defendant here is claiming that they won't know until trial, I think that's also a misapprehension of what the burdens are here.

We are about to get into discovery, and I agree with my -- with my adversary here that it is important to get into these issues. But that is precisely what discovery is for. And the Trustee's experts, once they've had the opportunity to participate through discovery, will issue an expert report, which will show the tracing and the flow of funds from the initial -- from BLMIS to Fairfield Sentry and to Sumitomo. They will not be surprised at trial. We will have this throughout the discovery process.

This Court has already discussed and knows very well that the Trustee only needs to plead the necessary vital statistics, and we have done that, and that that is all that is required, and that's what we have done.

Thanks, Your Honor.

THE COURT: Okay. Mr. Landsman or Mr. Song, anything else you wish to add?

MR. LANDSMAN: Yes, just two quick replies to that.

THE COURT: Okay.

MR. LANDSMAN: He doesn't need any discovery from us because we don't have any discovery on that question about which is the initial transfer. We know nothing about it. We got the subsequent transfer; we'll give him discovery about that. But to identify the basis for his entire claim, he needs no discovery from us.

So what he's saying is, we now need to go take discovery on those hundreds of transfers and take depositions on those hundreds of transfers, because he can't even narrow it down to a smaller set. We're not asking him for tracing. We're asking, just tell us what the initial transfer was.

THE COURT: Okay. Understand. Anything else?

I thank everyone for their patience and your kindness all day long. I hope that you have a lovely evening. And you will receive a written opinion.

MR. LANDSMAN: Thank you, Your Honor.

MR. SONG: Thank you, Your Honor.

THE COURT: Thank you.

(Whereupon these proceedings were concluded at 3:54 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: September 19, 2022

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